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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS NOONS AND PHILIP NOONS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT GRANTED THE GOVERNMENT'S PETITION FOR WRIT OF MANDAMUS IN A CRIMINAL CASE CONCERNING A PRETRIAL ORDER THAT DID NOT HAVE THE EFFECT OF DISMISSAL?

2. WHETHER THE FIFTH CIRCUIT'S DECISION CONCERNING A DISTRICT COURT'S AUTHORITY TO ORDER A PRETRIAL DEPOSITION IN A CRIMINAL CASE IS IN CONFLICT WITH A DECISION FROM THE TENTH CIRCUIT?

II.

PARTIES TO THE PROCEEDING BELOW

Petitioner below:

UNITED STATES OF AMERICA (Respondent herein)

Respondents below:

THOMAS NOONS AND PHILIP NOONS (Petitioners herein); THE HONORABLE LYNN HUGHES, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

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V.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *In re United States,* 878 F.2d 153 (5th Cir. 1989). It is attached as Appendix A.

The opinion on suggestion for rehearing *en banc* is reported at 880 F.2d 413 (5th Cir. 1989). It is attached as Appendix B.

The order of the United States District Court for the Southern District of Texas is not reported in any official or unofficial reporter. It is attached as Appendix C.

The transcript of the hearing on Defendants' Motion to Take *Ex Parte* Deposition Under Seal, before the Hon. Lynn Hughes, United States District Judge for the Southern District of Texas, is attached as Appendix D.

The transcript of the hearing on Motion to Quash. before the Hon. Lynn Hughes, United States District Judge for the Southern District of Texas, is attached as Appendix E.

VI.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals was entered on June 14, 1989. The judgment on suggestion for rehearing *en banc* was entered on July 12, 1989. No extensions of time for filing petition for writ of certiorari have been granted, and this is not a cross-petition for writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari. *See, also, Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980).

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth and sixth amendments to the U.S. Constitution; 18 U.S.C. § 3731; and Rules 15 and 16, Fed. R. Crim. P. These are set out in their entirety in Appendix M.

VIII.

STATEMENT OF THE CASE

Philip S. and Thomas F. Noons ("the Noons"), who are brothers, were indicted on March 8, 1989 for alleged violations of 18 U.S.C. §§ 371, 657 and 1001 by a grand jury for the United States District Court for the Southern District of Texas. The five-count indictment accuses the Noons of conspiracy, misapplication of assets held by the Federal Savings and Loan Insurance Corporation (FSLIC), and making false statements to the FSLIC.

On April 3, 1989, the Noons filed a motion to dismiss or suppress. (Appendix F) The motion alleged that the evidence that formed the basis of their indictment was obtained illegally by their own lawyer, Mr. C. Marshall Rea, who secretly tape recorded conversations with both the Noons, by body mike and telephone tape recorder, as a condition of obtaining use immunity from the government.

In connection with that motion, the Noons filed a motion to take an *ex parte* deposition of Mr. Rea, who, according to his motion to quash (Appendix L), would not discuss the case with them or their trial counsel. (Appendix H) This motion was supported by prima facie evidence of the lawyer-client privilege that existed between Mr. Rea and the Noons.

After a hearing (Appendix D), the district court, the Hon. Lynn N. Hughes presiding, granted the Noons' motion for deposition on May 3, 1989. (Appendix C) After a second hearing (Appendix E), the court denied Mr. Rea's motion to quash.

The government filed an application for writ of mandamus to set aside the order compelling Mr. Rea to appear for deposition. The Noons responded that the appellate court lacked jurisdiction to enter a writ of mandamus and that the trial court's order was an appropriate exercise of its discretion. On June 14, 1989, the United States Court of Appeals for the Fifth Circuit granted a writ of mandamus. On July 12, 1989, it denied the Noons' suggestion for rehearing.

IX.

ARGUMENT AND REASON FOR GRANTING WRIT

A. INTRODUCTION

The government in this case turned an attorney into an informant against his own clients. With the attorney's cooperation, the government surreptitiously taped attorney-client conversations. This tactic has been condemned in a previous case, in circumstances not as

egregious as this. *See United States v. Ofshe*, 817 F.2d 1508, n. 6 (11th Cir. 1987).

In *Ofshe*, the government persuaded an attorney to tape record conversations with his client that involved transactions different from those which formed the basis of the indictment at issue. The government warned the attorney not to reveal any conversations arising from his representation of the defendant. *United States v. Ofshe*, 817 F.2d at 1508. In this case, the government's tactic was to record Mr. Rea and his clients discussing the very matters for which they subsequently were indicted. As a result, the government interfered with a privileged attorney-client relationship between Mr. Rea and the Noons prior to indictment. Its conduct interfered with the Noons' ability to prepare their defense after the indictment.

It was undisputed before the trial court that when the FBI first contacted Mr. Rea about the Noons, he invoked the lawyer-client privilege. (*See* Affidavit of Thomas Noons attached to Defendants' Reply to Government's Response to Motion to Take Ex Parte Deposition, Appendix J) According to FBI Agent William Cavanaugh's testimony at the Noons' pretrial detention hearing, Mr. Rea received legal fees for his services in connection with matters that form the basis of three counts of the indictment, the so-called Forum transaction. (*See* the excerpt of Mr. Cavanaugh's testimony attached as an exhibit to Appendix L) Checks evidencing such payments were turned over by the government during discovery. (Appendix L)

The evidence necessary to prove that the government unlawfully interfered with a legitimate lawyer-client rela-

tionship and the evidence necessary to support the Noons' motion to dismiss or suppress are uniquely within Mr. Rea's knowledge. Similarly, the evidence necessary to develop an "advice of counsel" defense to the charges against them also rests with Mr. Rea. In contrast, the government has no interest, constitutional or otherwise, in preventing such contact between Mr. Rea and his clients.

In order to obtain this evidence without being forced to disclose to the government their defense, to waive their claim of privilege, or to reveal other privileged matters, the Noons sought the *ex parte* deposition of Mr. Rea. After considering the Noons' constitutional interests, the trial court ordered the deposition. The order was within the trial court's authority under Rules 15 and 16, Fed. R. Crim. P., and its inherent authority to control the conduct of cases before it.

Although the government had no right to appeal the district court's order pursuant to 18 U.S.C. § 3731, it sought review by petition for writ of mandamus. The court of appeals took the extraordinary step of granting the writ even though the circumstances were far beyond those in which this Court has held that mandamus is appropriate in a criminal case, *see Will v. United States,* 389 U.S. 90 (1967), and even though at least one other circuit has found that a district court has authority to make such an order. *United States v. Carrigan,* 804 F.2d 599 (10th Cir. 1986).

B. QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT GRANTED THE GOVERNMENT'S PETITION FOR WRIT OF MANDAMUS IN A CRIMINAL CASE CONCERNING A PRETRIAL ORDER THAT DID NOT HAVE THE EFFECT OF DISMISSAL?

This Court "has never approved the use of the writ [of mandamus] to review an interlocutory procedural order in a criminal case which did not have the effect of dismissal." *Will v. United States,* 389 U.S. at 98. Yet the Fifth Circuit used the writ for this precise purpose. The action that the appellate court reviewed was simply a pretrial discovery order in a criminal case that fell well within the trial court's jurisdiction and discretionary power. The trial court's order did not dismiss the case nor did it otherwise act as a final judgment against the government.

The traditional use of the writ of mandamus in aid of appellate jurisdiction has been to confine the lower court to a lawful exercise of its jurisdiction. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943). Only exceptional circumstances amounting to a usurpation of power will justify use of the writ. *Will v. United States,* 389 U.S. at 95, *citing De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 217 (1945).

The rules of criminal procedure authorize trial courts to order depositions in criminal cases, and to control the course of discovery in such cases. Nothing about the trial court's order makes it "of the exceptional and ex-

traordinary nature that justifies the use of the writ." *United States v. Hughes,* 413 F.2d 1244, 1248 (5th Cir. 1969), citing *Schlagenhauf v. Holder,* 379 U.S. 104 (1964).

Rule 16(d), Fed. R. Crim. P., places the regulation of discovery in criminal cases within the trial court's discretion. Rule 16, Fed. R. Crim. P. Further, Rule 15, Fed. R. Crim. P., provides: "whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may . . . order that the testimony of such witness be taken by deposition . . ." Rule 15, Fed. R. Crim. P. The facts of this case presented the trial court with such an exceptional circumstance.

The language of Rule 15 was amended in 1974 to enlarge the trial court's discretion and to "make clear that the decision by the Court as to whether to order the taking of a deposition shall be made in the context of the circumstances of the particular case." Rule 15, Committee Notes to the 1974 Amendments. Neither the rule's language nor the committee notes supports the appellate court's assertion that Rule 15(a) is limited to depositions for preservation of testimony.

Further, the government's argument before the court of appeals that Rule 15 does not authorize depositions of adverse witnesses is inapposite. Mr. Rea is the Noons' attorney; he may well be the Noons' witness. His testimony is essential to their development of an advice of counsel defense. He can hardly be said to be the government's exclusive witness. As the tenth circuit has noted: "witnesses in a criminal prosecution belong to no one . . ." *United States v. Carrigan,* 804 F.2d at 603.

The fifth circuit concluded that the appropriate forum for the Noons to question Mr. Rea is at hearing on the Noons' motion to dismiss indictment or to supress evidence. However, every question asked by their trial counsel risks exposing the Noons' confidences to the judge, court personnel, AUSA's, FBI agents, jurors, press and whomever else wanders into the courtroom. If they cannot talk to their attorney now, the Noons may be forced to wait until trial to find out whether their lawyer is going to support or refute any advice of counsel defense that they may choose to assert. At best, they will be forced to reveal their trial strategy to the government by questions put to Mr. Rea during a hearing.

The government violates a defendant's right to effective assistance of counsel when it interferes with counsel's ability to make independent decisions about how to conduct the defense. *Strickland v. Washington,* 466 U.S. 668, 683-6 (1984). The Noons' counsel cannot build their defense with the government listening in. The result of the mandamus below, then, is to sanction a violation of the Noons' sixth amendment rights to effective assistance of counsel and to compulsory process. By making the government and other eavesdroppers to the confidential relationship privy to the building of their defense, the ruling also violates the Noons' constitutional right under the fifth amendment to due process of law—to "fair procedures to assure a fair trial," *United States v. Carrigan,* 804 F.2d 599 (10th Cir. 1986).

The trial court was confronted with a clash between competing values. The Noons' concerns, unlike the government's, rise to constitutional dimensions. Its decision was to compel Mr. Rea to speak to his former clients' counsel, in sworn testimony similar to that obtained by

the government in grand jury proceedings, and with the necessary safeguards to the attorney-client privilege. Under both Rule 15 and Rule 16, the trial court was well within its discretion when it issued the order that forms the basis of this action.

The court of appeals did not address the issue of its jurisdiction, though the Noons raised it in their response to the government's application for writ. The appellate court simply concluded that mandamus was an appropriate remedy ". . . where, as here, the applicant has no other means of redress, whether by present appeal, appeal after trial or otherwise. . ."

Contrary to the court's assumption, however, the government has other means of redress. While the order at issue is not appealable, a contempt sanction by the trial court for failure to comply would be appealable. Similarly, if the evidence obtained by the Noons as a result of the deposition order resulted in dismissal of this indictment, the government would have the right to appeal. 18 U.S.C. § 3731. In any event, Congress did not intend that the government have a right to redress every error that occurs to its detriment during criminal prosecutions, as Section 3731's narrow scope makes clear. Any arguable lack of redress, then, does not necessarily entitle the government to a writ of mandamus.

Because the government is not without redress, and because the trial court was within its discretion, the court of appeals improperly invoked the extraordinary writ of mandamus. The granting of the writ in this case is a departure from more than 20 years of judicial admonitions against use of the writ to review nondispositive orders in criminal cases.

2. WHETHER THE FIFTH CIRCUIT'S DECISION CONCERNING A DISTRICT COURT'S AUTHORITY TO ORDER A PRETRIAL DEPOSITION IN A CRIMINAL CASE IS IN CONFLICT WITH A DECISION FROM THE TENTH CIRCUIT?

The fifth circuit based its conclusion that the deposition order was improper upon earlier law from that circuit. The cases are not controlling because they do not involve requests for extraordinary relief. They do not hold that a district court that orders a deposition in a criminal case has usurped its power, as the appellate court concluded in this case.

In *United States v. Fischel,* the fifth circuit held that the government's failure to provide defense counsel with a witness' address did not require reversal of a conviction. *United States v. Fischel,* 686 F.2d 1082 (5th Cir. 1982). In *In re Eisenberg,* the court affirmed a trial court's decision to deny a request for a civil discovery deposition prior to commencement of civil proceedings. *In re Eisenberg,* 654 F.2d 1107 (5th Cir. 1981). Neither involved the serious misconduct at issue in this case.

The court of appeals also expressed skepticism about the Noons' concerns regarding potential waivers of their attorney-client privilege and disclosure of their defenses to the government. Its opinion came close to rendering an advisory opinion on these issues: "By the same token, it would appear that use of the attorney's testimony . . . would not result in a waiver thereof." (Appendix A) The issues are far from clear-cut, however.

In fact, the uncertainty that surrounds waivers and partial waivers of attorney-client privilege led the American Bar Association's Litigation Section recently to pre-

pare an amicus brief before this Court in support of a petition for certiorari in a case raising these issues, *In re Martin Marietta,* 856 F.2d 619 (4th Cir. 1988), *cert. denied,* 109 S. Ct. 1655 (1989). The fourth circuit in that case concluded that a partial disclosure of privileged information during plea discussions constituted a waiver of the privilege with respect to related information. The opinion conflicted with a second circuit case which held that the scope of implied waivers after partial disclosure of privileged material is quite narrow. *In re Von Bulow,* 828 F.2d 94 (2nd Cir. 1987). The Noons' concerns, then, are far from fanciful.

Neither the government nor Mr. Rea, who has received immunity and can suffer no sanction save those related to perjury, has any interest that would be jeopardized by the deposition that the trial court ordered. The fifth circuit erred in concluding that the court's exercise of its discretion to balance the competing concerns before it should be a subject to writ of mandamus. In so ruling, it directly conflicts with an opinion from the tenth circuit that considered the same issue on mandamus and concluded: "the district court has the power in extraordinary circumstances to permit the taking of an opposition witness' deposition." *United States v. Carrigan,* 804 F.2d at 604.

In *Carrigan,* the trial court found that the government improperly interfered with a defendant's access to prospective government witnesses. The trial court then ordered that the defendants be permitted to take the depositions of two of those witnesses, pursuant to Rule 16(d) and the "court's inherent power to enforce fair procedures to assure a fair trial . . ." *Id.* at 601. The tenth circuit

concluded that the district court's order did not constitute a usurpation of power.

The facts of this case are even more compelling than those in *Carrigan* because Mr. Rea is not an ordinary witness. In this case, the government has interfered with the attorney-client relationship and turned the Noons' attorney into an informant against them. It has attempted to justify its conduct by arguing that the taped conversations fall within the crime-fraud or other exceptions to the privilege.

During its investigation, the government could have subpoenaed Mr. Rea to a grand jury. If he refused to testify by asserting the attorney-client privilege, the government could have subjected him to contempt proceedings, in which a judge would decide whether the prosecution was justified in breaching the lawyer-client relationship. Instead, the government unilaterally decided to invade that relationship, an act that allowed it to make its case against the Noons while simultaneously depriving them of the most important witness they have, their own lawyer. The government's conduct overlooks one fact: the government may be wrong.

The Noons have never contended that a defendant ordinarily can compel a witness to speak to him prior to trial. But they have no way to prepare for a suppression hearing or their defense against the case in chief without revealing additional privileged information with each question their trial counsel asks of Mr. Rea. They need to discuss privately with Mr. Rea his reasons for agreeing with the government to breach their confidential relationship and the circumstances surrounding that breach. To build a reliance on counsel defense, they

also must discuss the legal advice Mr. Rea gave them, and the reasons why he later decided their conduct was unlawful. Contrary to the fifth circuit's suggestion, this information cannot be within the Noons' own knowledge.

Just as a defendant will not be allowed to abuse the attorney-client privilege to shield criminal conduct, the government should not be allowed to exploit that confidential relationship by turning attorneys into informants against their clients. If a trial court does not have the power to enter an order such as this, the government would be able in any case to commence criminal investigations against attorneys in order to make cases against their clients, offering immunity to the attorneys in exchange for testimony and for investigative work such as Mr. Rea's surreptitious tape recordings of his clients.

The tenth circuit's denial of mandamus in *Carrigan* respects the discretion that trial courts require to manage their cases and to do justice in a variety of factual settings. The fifth circuit's mandamus radically limits a trial court's ability to resolve unique problems such as this case presents.

X.

CONCLUSION AND PRAYER

For these reasons, the Noons respectfully request that this Court issue a writ of certiorari to review the mandamus entered by the Court of Appeals for the Fifth Circuit and that, upon review, the mandamus be vacated.

Respectfully submitted,

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XI.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2463

IN RE: UNITED STATES OF AMERICA,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

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(Filed June 14, 1989)

Before RUBIN, GARWOOD, and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

In this case, the government has applied for a writ of mandamus directing the district court to set aside a pre-trial order in a pending criminal case providing for the defense to take, *ex parte,* the discovery deposition of a witness. On the government's motion, we previously stayed the taking of the deposition, which had been scheduled for the following day, in order that we might more fully

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

consider the matter and have the benefit of briefing by both the government and the defense. After considering the briefs and supporting exhibits, we now determine that the government is entitled to the relief sought.

The defendants below are Philip S. Noons and Thomas F. Noons. They were apparently originally named in a criminal complaint filed February 7, 1989, and an indictment was returned against them in the court below on March 8, 1989. The indictment charged violations of 18 U.S.C. §§ 371, 657, and 1001. It alleged that Philip Noons had been employed by Mainland Savings Association (Mainland) in Houston, Texas, whose deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC) until it was closed by the FSLIC on or about April 4, 1986. The FSLIC acted as receiver for Mainland from approximately May 1, 1986 through approximately August 5, 1988, and during that time Philip Noons was employed as an asset manager with the FSLIC in its capacity as receiver for Mainland. It was alleged that Philip Noons and his brother Thomas Noons conspired to make false statements to and defraud the FSLIC, as Mainland's receiver, by causing it to sell, for less than fair value, an asset of Mainland's to an entity controlled by C. Marshall Rea (Rea). It was further alleged that the Noonses secretly furnished Rea's entity some of the funds that it used to purchase this asset, and that Philip Noons misrepresented to the FSLIC officials making the decision to sell what the asset was worth. The asset in question was an installment note from a third party. The sale of the asset apparently occurred in March 1988, but the conspiracy allegedly continued thereafter and until the time of the indictment, and included efforts to secretly transfer some of the collections on the note to the Noonses.

On April 3, 1989, the Noonses filed in the district court a motion to dismiss the indictment or to suppress evidence. In this motion, they alleged that Rea was their lawyer and that the government, with Rea's cooperation, had secretly recorded both telephone and face-to-face conversations between Rea and the Noonses, and that the recording and the disclosure to the government of these conversations were violations of the Noonses' attorney-client privilege and an invasion of their rights under the Fifth and Sixth Amendments. It was alleged that the indictment resulted from these recordings. The motion requested that the court conduct a pretrial hearing to determine whether the prosecution obtained information for the indictment from Rea by thus invading the privileged confidential communications between attorney and client, stating that such procedure was approved by this Court in *United States v. Fortna,* 796 F.2d 724 (5th Cir. 1986). The motion then requested that "upon hearing" the court accordingly dismiss the indictment or, alternatively, disqualify Rea as a witness against the Noonses and suppress all evidence obtained from or by Rea against them.

On April 14, the government filed its response to the motion to dismiss the indictment or suppress evidence, asserting that the recordings of the conversations with Rea had all taken place before the criminal complaint was filed, and that there was no attorney-client privilege because the communications in question were not for a legal opinion, or legal services, or assistance in a legal proceeding, but were rather simply for business advice or to procure Rea to act as a disburser of money or property, and also that they were for the purpose of furthering an intended, present, or continuing illegality.

In the meantime, the Noonses, on April 11, had filed their motion to take Rea's deposition *ex parte* and under seal for the purpose of questioning him regarding his relationship with the Noonses, what he told the government about the Noonses, and "all matters pertinent to this case." This motion recited that Rea's lawyer had informed the Noonses' defense counsel that Rea refused to be interviewed by the Noonses' counsel unless the Assistant United States Attorney was also present.[1] This motion also asserted that the deposition should be *ex parte* in order to preclude further invasions of the Noonses' attorney-client privilege with Rea. The government responded to the motion to take Rea's deposition on April 17, pointing out that Rule 15, Fed. R. Crim. P., did not authorize discovery depositions, and that there was no suggestion that Rea would be unavailable either for trial or for any pretrial hearings, and that there was also no authority for *ex parte* depositions under any circumstances.

On May 1 or 2, the Noonses filed their response to the government's reply to their motion to take Rea's deposition. In this pleading, the Noonses reiterated their allegation that Rea's counsel had informed their counsel that Rea would not talk to the defense unless the Assistant United States Attorney was also present; they also asserted that this precluded them from developing "an 'advice of counsel' defense." In this pleading, the Noonses further acknowledged that on April 28, 1989, the Assistant United States Attorney had turned over to them the various tape recordings of Rea's challenged conversations with the Noonses (it appears that these conversations

1. It is clear that Rea never represented the Noonses in the criminal proceeding; they were represented there by other unrelated counsel.

took place between October 4, 1988 and February 7, 1989). The Noonses further contended in this pleading that even if the deposition were not authorized under Rule 15, the court had the inherent power to order it.

On May 2, a nonevidentiary hearing was held before the district court on the Noonses' motion to take Rea's deposition. The next day, the district court entered the following brief order which is the subject of this mandamus allegation, *viz.*:

> "C. Marshall Rea is compelled to testify under oath without the government present for the limited purpose of discovery; the deposition shall remain sealed until further order of this court."

Subsequently, the deposition was scheduled for May 11, 1989.

It appears that at the time of the May 2 hearing, trial on the merits in the case had been set for the following week, but at that time the district court canceled that setting and, as we understand it, the case has not been reset for trial. Apparently, a hearing on the Noonses' motion to dismiss the indictment or suppress evidence is not set, and has never been set.

The district court's order makes no findings and recites no reasons or source of authority for the action taken. Its remarks at the May 2 hearing likewise contained no findings or indication of authority for the order. However, they do indicate some of the district court's concerns. In addressing the Assistant United States Attorney, the court stated that "this is simply a way of getting a compulsory statement from the witness under oath. And you [the government] have the ability to do that [presumably

by subpoenaing the witness before the grand jury], the defendants don't." In a similar vein, the court remarked that a defendant "ought to have at least partially the same technique available to him that the government has available to it [presumably referring to use of the grand jury], which is a statement, in effect, under oath." The court also indicated that the defendants needed to engage in this discovery, stating, "[T]hey need to know with certainty that this is their former lawyer's statement before they can decide whether to waive the entire attorney-client privilege, or any other statute, including pleading guilty."

It is clear that the district court's order is not authorized by Rule 15(a). That rule is limited to depositions taken so that testimony may be "preserved for use at trial." *Id.* It does not authorize depositions for discovery purposes, as the authorities uniformly recognize. We stated in *United States v. Fischel,* 686 F.2d 1082, 1091 (5th Cir. 1982), "[d]epositions are not discovery tools in criminal cases." *See also Application of Eisenberg,* 654 F.2d 1107, 1113 n. 9 (5th Cir. 1981) ("[i]n criminal cases, depositions are not intended as discovery devices"); *Simon v. United States,* 644 F.2d 490, 498 n. 12 (5th Cir. 1981). Other circuits are in accord. *See United States v. Troutman,* 814 F.2d 1428, 1453 (10th Cir. 1987); *United States v. Cutler,* 806 F.2d 933, 936 (9th Cir. 1986); *United States v. Hutchings,* 751 F.2d 230, 236 (8th Cir. 1984), *cert. denied,* 474 U.S. 829 (1985); *United States v. Steele,* 685 F.2d 793, 809 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982); Wright, *Federal Practice and Procedure: Criminal* § 241 at 4 & n. 7 (2d ed.). Nor can the deposition be authorized under Rule 16, Fed. R. Crim. P. That rule does not

mention depositions, which are plainly to be governed by Rule 15. Moreover, Rule 16, by its terms, does not authorize discovery of statements of third-party prospective government witnesses, apart from certain exceptions not relevant here, *see* Rule 16(a)(2), and Congress rejected a proposed 1974 amendment to Rule 16 which would have authorized discovery of the names and addresses of the witnesses the government intended to call in its case in chief. Wright, *supra,* § 254 at 86-88. Accordingly, Rule 16 affords no basis for a discovery deposion. *See United States v. Carrigan,* 804 F.2d 599, 602-03 (10th Cir. 1986). Here, however, there was no claim, evidence, or finding that Rea might be unavailable to testify at trial or at any pretrial hearing, and the district court expressly ordered that the deposition was "for the limited purpose of discovery."

We have recognized, however, that in certain limited instances the district court in a criminal case may order discovery not provided for by statute or the Federal Rules of Criminal Procedure. *Fischel,* 686 F.2d at 1091. This power was recognized by the Tenth Circuit in *Carrigan,* where it refused the government's requested mandamus to set aside the district court's order for the discovery deposition of two government witnesses, the district court's having found, on adequate evidence, that the government had wrongfully interfered with the witnesses' freedom to talk with defense counsel, the witnesses having previously to the government's misconduct indicated their willingness to talk to the defense, but thereafter having refused to do so. The Tenth Circuit in *Carrigan* described the district court's order as "a sanction for the government's interference with a defendant's access to potential prosecution witnesses," and refused

to set the order aside because it found that the record supported "the district court's factfinding that the government actively interfered with defense counsel's access to these witnesses." *Id.*, 804 F.2d at 604.

The Noonses rely heavily on *Carrigan*. But that decision does not support them for a variety of reasons. To begin with, here there is no allegation, no finding, and no evidence that the government in any way impeded the defendants' ability to talk to Rea. That key element of *Carrigan* is wholly missing. No right of a defendant is violated when a potential witness freely chooses not to talk. *Troutman*, 814 F.2d at 1453, and cases cited. *See also Fishel*, 686 F.2d at 1092 ("no witness is obligated to honor a defendant's request for an interview"). The district court proceeded on the erroneous assumption that the defendants had a right to have Rea talk to them whether or not he freely wished to do so. Further, there is no allegation, evidence, or finding that Rea ever did refuse to talk to the Noonses or their counsel; rather, there is only the allegation that he refused to do so unless government counsel was also present. There is nothing improper about this. Indeed, the order at issue in *Carrigan* directed that the deposition be taken "in the presence of their [the witnesses'] attorney and the government's counsel." *Id.*, 804 F.2d at 601.

In these circumstances, there is no basis whatever for the deposition order. *Cf. Cutler*, 806 F.2d at 936 ("[n]o court has allowed a Rule 15 deposition solely for discovery"; distinguishing *Carrigan*).

Moreover, the deposition order is unauthorized not only because it is for a purely discovery deposition, but also because it provides for the deposition to be *ex parte*

and sealed. No matter what the case—civil or criminal—depositions are *never* ordered where one party to the suit can be present, ask the questions, and hear the answers, and the opposing party in the case is not only prevented from being present and asking questions, but is also denied even the opportunity to know what the questions and answers are. Such a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation.

Nor do we believe that such an unprecedented procedure can be justified by the allegations that Rea, at the government's behest, wrongfully breached the attorney-client privilege between himself and the Noonses by disclosing to the government the Noonses' confidential communications to him which were protected by that privilege. The government denied that the communications were within the privilege, and further asserted that even if they were, they were covered by a well-recognized exception thereto. The May 2 hearing was not to resolve any of those issues, and no evidence on them was heard then; nor did the district court in its May 3 order make any findings in those respects. Whether there was a breach of the attorney-client privilege (and, if so, the government's role in it and any resulting prejudice to the Noonses) was to be resolved at the evidentiary pretrial hearing, which the Noonses requested (and the government did not oppose), on their motion to dismiss the indictment and to suppress evidence. Such a hearing, as the Noonses expressly recognized, is the appropriate vehicle to resolve those issues, as we held in *United States v. Fortna,* 796 F.2d 774 (5th Cir. 1986). And, *Fortna* makes clear that at such a hearing the Noonses would have the right to compel Rea's appearance and

have him testify. There is no indication, allegation, or finding that Rea would be unavailable for such a hearing. However, though there is no suggestion of any impediment or opposition to such a hearing, it has never been held.

We reject any suggestion that the sealed, *ex parte* discovery deposition was necessary or appropriate because of some danger that by calling Rea at the hearing on the motion to dismiss or suppress the Noonses would waive their privileges as to client-attorney confidential communications between themselves and Rea. We are aware of no authority that would support such a waiver, and neither the district court nor the Noonses (here or below) have cited any authority which assertedly supports it. Certainly, it is not a waiver of the privilege to object to the attorney's proffered testimony, even though in connection with laying the predicate for the objection the relationship and the nature of the communication must be explored. By the same token, it would appear that use of the attorney's testimony by the Noonses at the hearing on their motion to dismiss the indictment or to suppress, to establish that the indictment, or the evidence to be suppressed, resulted from a government-induced breach of the attorney-client privilege would not result in a waiver thereof. Seeking to thus enforce the privilege hardly seems to constitute a waiver of it. Further, these concerns are more appropriately addressed at the suppression hearing, or subsequent trial on the merits, or by an *in limine* ruling (never sought by the Noonses) in respect thereto, than by a deposition order of the kind here at issue. The courts have not been reluctant to afford such protection, where needed, in respect to developing evidence at a suppression hearing. *See, e.g.,*

Simmons v. United States, 88 S. Ct. 967 (1968). Finally, as previously noted, it has yet to be established or found that the communications in question were protected by the attorney-client privilege.[2]

We recognize that generally discovery and similar pre-trial orders, even erroneous ones, are not reviewable on mandamus, particularly in a criminal case. We intend no departure from that salutary principle. However, where, as here, the applicant has no other means of redress, whether by present appeal, appeal after trial, or otherwise, the circumstances are exceptional, and the applicant establishes "a clear and indisputable abuse of discretion or usurpation of judicial power by the trial court," we have held that mandamus is available. *See In re First South Savings Ass'n,* 820 F.2d 700, 705-07 (5th Cir. 1987). We also note that the Tenth Circuit in *Carrigan* indicated that it would have granted mandamus to set aside a district court deposition order in a criminal case had it not found that there was some evidence to support the district court's factual finding that the government wrongfully interfered with the defense access to the witnesses. Here, the case for mandamus is much stronger. We need not parse the evidence, for there was no evidentiary hearing. Moreover, here neither the allegations of the motion to take the deposition, nor the district

2. Nor do we see how the Noonses' asserted " 'advice of counsel' defense"—mentioned in their last-minute reply to the government's opposition to their motion to take Rea's deposition but not adverted to by the district court—furnishes any support for the deposition order. Again, such a "defense" is something which can be established at trial. Further, the Noonses certainly know what Rea told them and what they relied on. Moreover, they were furnished the tapes prior to the May 2 hearing. All this also makes suspect any claimed need for discovery, even if depositions (to say nothing of *ex parte,* sealed depositions) were proper for discovery in criminal cases.

court's order, nor its remarks at the hearing state any lawful grounds for the order. It was wholly unauthorized. Further, so far as we can determine, the order is entirely unprecedented and constitutes a clear and very substantial departure from the fundamental principles governing criminal pretrial and trial procedures in federal court. The district court's deposition order in these circumstances was so plainly and substantially in excess of its authority, and so significantly contrary to the established rules and precedents governing depositions in criminal cases, as to constitute a clear and indisputable abuse of its more general discretion to control the incidents of trial and pretrial procedure in cases before it. There is no available remedy other than mandamus. This, then, is that most rare and exceptional case where relief by mandamus is appropriate respecting a criminal case deposition order.

Accordingly, we determine that the government is entitled to the writ of mandamus which it seeks. As we assume that the district court will set aside its May 3 order in light of this opinion, we do not direct that the writ of mandamus now actually issue.

MANDAMUS GRANTED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2463

IN RE:
UNITED STATES OF AMERICA,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

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(Filed July 12, 1989)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, ____F.2d____)

Before RUBIN, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

Judge Jones did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL CASE NO. 88-92

UNITED STATES OF AMERICA,
Plaintiff,

v.

PHILIP NOONS and THOMAS NOONS,
Defendants.

(Filed May 3, 1989)

ORDER

C. Marshall Rea is compelled to testify under oath without the government present for the limited purpose of discovery; the deposition shall remain sealed until further order of this court.

Signed on May 3, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX D

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILLIP S. NOONS, ET AL

HOUSTON, TEXAS
MAY 2, 1989

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES

APPEARANCES:

For The Plaintiff:
Mr. John R. Braddock
Ass't U. S. Attorney
Houston, Texas

For The Defendant:
Mr. David Berg
Berg & Androphy
Houston, Texas

Court Reporter:
Herman Chester
515 Rusk, #7705
Houston, Texas 77002
(713) 221-9580

Proceedings Recorded By Mechanical Stenography,
Transcript Produced By Computer-Aided Transcription.

[2]

The Court: Thank you, be seated.

Sorry to keep you waiting, we had something else scheduled, which is obvious at this point, that ran on for a while.

Did somebody pick up the papers? Don't we have a bundle of papers that somebody was going to return to somebody?

All right. Mr. Braddock, it seems to me to make some sense under these circumstances for the deposition to be taken. After all, the Government has the power to take statements under criminal penalty rather casually. One of the anomalies of our system is that it's all right for the Government to lie to people, it's not all right for the people to lie to the Government. But the Defendant, in this case, I think, needs to know what his former lawyer is going to say under oath before he can decide the extent to which he he wants to waive the attorney-client privilege or the examine the extent to which it may have already been intruded upon. I don't know how he can do it otherwise, except by giving up the protection that he's got, if you are there, it's going to be waived. It seems that he ought to have at least partially the same technique available to him that the Government has available to it, which is a statement, in effect, under oath.

Mr. Braddock: Well, Your Honor, obviously the Government disagrees with that and has filed an objection to taking such. The rules just don't provide for taking a

[3]

deposition ex parte, they just do not. Certainly, any wit-

ness in any case can choose who he wishes to talk to and who not to talk to.

The Court: That's not my point. My point is this is simply a way of getting a compulsory statement from the witness under oath. And you have the ability to do that, the Defendants don't.

Mr. Braddock: The only way that the Government has the ability to do that is if we bring the witness before the Grand Jury. If the witness chooses to cooperate with the Government in the course of the investigation, he does so like any witness does. But to give—the Government obviously just does not feel that the law provides for the Defendant to be able to take a sworn statement from a witness where the Government is not present when that witness, where that statement may be used at some point in the proceeding, which is what is being proposed here.

The Court: I don't know whether I'm going to let them use the statement in the proceedings, but the Defendants have a right to take a sworn statement from any witness without your presence.

Mr. Braddock: If the witness decides to do so.

The Court: If the witness chooses. The question is compulsory process. And I think under these circumstances the Defendants need the compulsory process in order to have some

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idea of what their defense needs to be.

Now, I'm not ruling now that I am going to use it at trial or anywhere else, except, obviously, for impeach-

ment, if the witness gives them a statement that is what happened and at the time of trial testifies about is what happened I'm going to let them use it for impeachment. But they need to know with some certainty that this is their former lawyer's statement before they can decide whether to waive the entire attorney-client privilege, or any other statute, including pleading guilty.

I just can't think of another—I have tried to think of another way to accomplish it.

Mr. Braddock: Your Honor, I can see having an evidentiary hearing where the witness is called in an evidentiary hearing. It seems to me what is trying to be found out was there an attorney-client privilege. The Government has cited to that Court cases that indicate if a—if two individuals are conspiring to violate the law just because; one, he's a lawyer doesn't make attorney-client privilege and, B, the 5th Circuit certainly ruled in this case, even unwittingly, the perpetration of a fraud the attorney-client privilege disappears. That is pierced regardless whether that is thought to have attorney-client privilege to begin with.

The Court: They need to know what he is going to say. For all I know, Marshall Ray is the real culprit and he's

[5]

attempting to name his client for something that he did.

Mr. Braddock: Your Honor, if that's the case, then that is discovery of what the witness is going to say prior to trial. And there's nothing in the rules that provide for that. If the defense wants to make that its defense and

cross examine Mr. Ray on that when he is presented as a Government witness, that's certainly fine. But to allow an ex parte remedy to try to do something the rules do no provide, the Government would have to object and does object.

The Court: Well, most of the time there's not a question of privilege involved in the witness' testimony. Although, I will tell you perhaps it is only my ignorance of criminal law as a whole, but I don't understand why there's not open discovery in criminal cases. The State of Florida seems to survive with full discovery on both sides. I think we would dispose of more cases more efficiently if discovery were allowed. But that's a policy choice somebody else has made. But in this case, for the limited purposes of them ascertaining which of their confidences have been used or might be used and what position their former confidant is going to take, I think they need to have the opportunity for a compulsory statement under oath which they then can choose to reveal or not to reveal. But I don't know how else they can decide what they are going to do.

It would not be illegal for Ray to lie to them

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and tell them he is going to say one thing and then get on the stand and do something different. But if he does that to you, he goes to prison. And that, it seems to me, having the Government's thumb on the scales.

I don't mean that as perjurity to you, it's the quality of procedures.

And I can see that the right to compulsory process

for his defense under these circumstances under the Constitution can include this deposition.

I want it to be brief and to the point, though. I want you to cover what you need to cover with this man and get it over with. Don't range outside of the confidences they shared and what he's disclosed and what his position is about what they did.

And then, if some decision is made about waiving the privilege, I think Mr. Braddock then is entitled to know in advance that we're now going to use or would like to use it. I think you ought to talk about it after you get some idea of what the facts are.

Mr. Berg: Yes, sir.

The Court: On the other motions, they all look like things you can work out.

Mr. Berg: We met before this Hearing, Your Honor, and worked out about 90 percent of them. But at this point, I really don't think, until we take the deposition, it would be

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fruitful to go forward with it.

The Court: See what he says, see what your client's position is, talk with Mr. Braddock. If there's a problem, let Mary Gage know and we will take it up.

Mr. Braddock: May I ask the Court, I assume the Court is going to enter an order granting the ex parte deposition of Mr. Ray?

The Court: Yes. I think that's the simplest way to describe it. But, again, I'm not saying it's a deposition for

use at trial. That all depends on a bunch of other circumstances. At this point I'm letting them take a discovery deposition. The only use that I know of that I can expect now would be impeachment purposes. But I expect it's for discovery and planning purposes.

Mr. Braddock: Well, the only reason I ask that, Your Honor, is so I will know what the Court's order will be. Because it may be necessary for the United States to seek a review of the Court's order. And certainly the Court can enter any order it wishes to.

The Court: Right. What I am trying to say, I may word the order other than a deposition, since that has connotations broader than I expect. But what I may say is, "For the limited purpose of discovery in planning at this stage they are allowed to take his statement compulsory under oath."

Mr. Braddock: And the Government would not be present—

[8]

The Court: Right.

Mr. Braddock: —Correct?

May I bring up another matter, then, in that regard, Your Honor?

The Court: Yes, sir.

Mr. Braddock: As presently scheduled, this case is set for trial next week. Obviously, with these developments and other things, I assume we will not be going to trial until these matters can be resolved?

Mr. Berg: No objection, Your Honor.

The Court: What about this speedy trial business.

Mr. Berg: Our clients, if they have not already waived, and I think they did, waived their speedy trial rights, would do so again in the presence of this Court as of right now.

The Court: Yes. It seems to me it would be unwise, to attempt to continue with that trial setting, so we will continue that trial setting. But as usual, we would like it resolved as soon as possible.

Mr. Braddock: Your Honor—

The Court: Do we know what Mr. Ray's schedule is?

Mr. Braddock: I don't know, we will have to check with him. Obviously, Mr. Ray has counsel, too. I don't know what position Mr. Ray's counsel may wish to take in the matter.

The Court: Do you know who that is?

[9]

Mr. Berg: Yes, it's Hinton and Susman, Your Honor.

The Court: If they want to file a motion to quash, obviously, we will hear. We have had heard Mr. Braddock's side of the argument. And I will hear it just as soon as they get the notice.

Mr. Berg: Your Honor, just a procedural matter; Although we want to take his statement alone, as Your Honor has said, basically, if you say just a statement under oath, it may be the use of the term deposition was unwise.

The Court: That's the way I think of it.

Mr. Berg: May we proceed simply by notifying his attorneys, Your Honor, would that be acceptable?

I know the lawyers, they are, obviously—

The Court: Sure. I'm going to order that Mr. Ray give a statement under oath to the Defendants as long as he has notice. I am not going to hold him in contempt until he has notice. But if you will call his lawyer and tell him what the order says and try to arrange a time, I don't think you need to send a technical deposition notice.

Mr. Berg: I'm certain I can convey it to Hinton and Susman.

The Court: Just call them and tell thim that's what I have done. If they would like to quash that statement, then just tell you and call Mary Gage and I will take an oral motion to quash and we will get a hearing as soon as possible.

[10]

Tell Mr. Braddock, because he ought to be here for their motion to quash if he wants to.

Mr. Berg: I will see to all of that, Your Honor.

Mr. Braddock: Your Honor, the Government does have one matter pending; the Government has made an application to the Court to try to obtain records that are out of this country. And I really see no need for that to be delayed, unless the Court has some other reason not to do it. The Court can order us not to use those records if we get them, but we certainly would like to start the process going so we can at least make an attempt to get those records.

The Court: I'm sorry, where are at they?

Mr. Braddock: The Guernsey Islands off the coast of Great Britian.

Mr. Berg: Your Honor, it is premature at this point to allow the Government to search for records that may or may not be covered by attorney-client privilege.

The Court: Just have—is it a bank?

Mr. Berg: Yes, sir.

The Court: Have the bank produce them now under seal and give them—file them under seal.

Mr. Braddock: Yes, Your Honor.

The Court: But by the time they get here we are going to have this thing resolved.

Mr. Braddock: That's all the Government wanted.

[11]

The Court: Even if they used Federal Express in the Guernsey Islands—

Mr. Braddock: But the thing is, the Court needs to sign the order that's in and I will need to transmit it to Washington to be transmitted to the United Kingdom, Your Honor.

The Court: I always thought that was a defense technique, to ask for somehting from another country, because it tends to then take forever.

Mr. Braddock: Your Honor, I wish I could get it yesterday, to be honest with you.

The Court: When did you file it?

Mr. Braddock: I think we filed it April 7th, Your Honor.

The Court: You wouldn't have a second copy of the proposed order, would you.

Mr. Braddock: I think I do, Your Honor.

If I may, Your Honor, I will give the Court my file stamped copy of the request for the Court.

The Court: No, I have a request, I don't have the draft order.

Mr. Young: I think you have whatever is in the request, which is signed, but you—Your Honor, it's styled request because it comes from this Court to their courts. It should have been behind the application.

I do have another copy.

[12]

The Court: I'm sorry, I must have flipped over it.

Mr. Berg: Your Honor, may I comment?

The Court: Yes, sir.

Mr. Berg: On the request for judicial assistance question, we oppose it at this time. Those records would be turned over to the United States Attorney. So, if Your Honor does sign the order, as you've indicated, there needs to be a directive whatever record may or may not be produced be produced under seal for the Court. It just needs to be reworded, I think, consistent with your ruling.

Mr. Braddock: I think what will happen is I think

they will come through Washington and I can have Washington direct send them directly to the Court.

Mr. Berg: That's not the problem.

Mr. Braddock: The point would be, Your Honor, if the Court rules they are inadmissible it wouldn't matter, the Government already thinks it knows what they are going to say. We don't have them in hand.

The Court: His point is, he doesn't want you to look at them until he is sure they are not attorney-client documents. There's some difficulty in seeing bank records.

Mr. Braddock: They are bank documents.

The Court: I'm not saying it's not possible.

Mr. Berg: If those records are—excuse me, Your Honor, I'm in this quantry of almost whatever I say involves

[13]

expressing lawyer-client privilege, that's why we think they should be under seal.

The Court: It's frequently been your position that whatever you say is going to get you deeper in trouble.

Mr. Berg: It frequently has gotten me in trouble, too.

The Court: This is on your word processor, isn't it?

Mr. Braddock: Yes, Your Honor.

The Court: Would you add in there at the appropriate place—frankly, I'm not—perhaps on the page they before the first arabic number, "The production under seal to the Court of all records."

Mr. Braddock: I can do that, Your Honor.

The Court: I guess I can interlineate, but since it's going to a foreign government, let's type it in there.

Thank you.

If you will get that me, I'll get it signed.

Thank you, counsel.

Mr. Berg: Thank you, Your Honor.

(Hearing adjourned.)

I certify that the foregoing is a correct Transcript of the Proceedings had in the above-entitled cause 5-25-89.

/s/ HERMAN CHESTER
Herman Chester
Official Court Reporter

APPENDIX E

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILLIP S. NOONS, A/K/A PHILLIP NOONS,
A/K/A PHIL NOONS;
THOMAS F. NOONS, A/K/A TOM NOONS

HOUSTON, TEXAS
MAY 10, 1989
1:53 P.M.

BEFORE THE HONORABLE LYNN N. HUGHES

APPEARANCES:

For The Plaintiff:
Mr. John Braddock

For The Defendants:
Mr. David Berg
Ms. Cheri Duncan

For Mr. Ray:
Mr. Bob Sussman
Mr. Mike Hinton

Also Present:
Mr. Phillip Noons
Mr. Thomas Noons

Court Reporter:
Ms. Linda D. Williams

Proceedings Recorded by Mechanical Stenography;
Transcript produced by Notereading.

[2]

THE COURT: Every time we get together the crowd grows.

All right. I have read the witness's motion, and I'm not persuaded. One of the essential parts of the opportunity to defend yourself is to the availability of a compulsory process. And this, particularly, sensitive area of a government witness, who was a former lawyer for the defendant, I have concluded that is essential to the defendant, the defendants have some reliable idea of what this witness is going to say they said. After all they were confidences at the time; therefore, the availability of outside sources of corroboration for impeachment are not going to generally be available.

Mr. Ray, seems to me, to have no interest which needs protecting here. He doesn't want to talk. Most people don't want to be witnesses. It wasn't an invitation. It was a command. He would have to testify at trial in any event, to be subpoenaed, but what is essential here is having that testimony only available at trial. And the Court's opinion completely vitiates the ability of these defendants to prepare.

Do you want to address anything in particular or in general in response to that?

MR. SUSSMAN: Well, let me start out in

[3]

particular, Your Honor. The Court's motion or the Court's order, I should say, does not state specifically whether or not Mr. Ray will be afforded the right to

counsel in this deposition. Mr. Berg has informed me that the Court had decided that he would not be afforded that opportunity, and the order is silent to it. We spoke to it in the motion.

MR. BERG: Excuse me, Counsel, please. What I told him was after consultation or after discussing the matter with the court clerk—court law clerk—was that Your Honor had said that he could not have counsel in the deposition but outside the door, just like the government has in a Grand Jury, if I might add.

THE COURT: The dilemma there is that asking the question in the presence of counsel then discloses it to a third party. I will analogize it to the Water board engineer in their secret deliberations. The Water board deliberations thinks under certain circumstances they can retire and have confidential deliberations. They always take their engineer with them, but he's always a contract engineer, and I particularly held that if he can be there so can the general public. So, I'm afraid that compelling the testimony in the face of counsel—but I don't have any problem with Mr. Ray

[4]

having the opportunity to consult with counsel at any time he chooses. But I don't want—I can't compel the disclosure in front of you any more than I can in front of anybody else. If you can solve that problem for me, I'll welcome it.

MR. SUSSMAN: Your Honor, my problem is, with the scope of the Court's order as to limited discovery purposes—and I'm not sure what that means, Your Honor, and Mr. Berg's—

THE COURT: That's put in there to protect the government's right to participate before anything is developed that is useful at trial except for impeachment purposes. Since I'm not letting the government participate, it's a discovery deposition and not a perpetuation deposition. That's why it says for discovery purposes.

MR. SUSSMAN: I understand that the rights of the defendant are important, Your Honor, but the rights of Mr. Ray, I think, are just as important. Putting him in a room with just a court reporter and Mr. Berg at this point and giving Mr. Berg free rein to ask him anything he wants to, could subject him to—you say he doesn't have anything to be concerned about. Anybody that gives any kind of statement, especially in this case, would have something to be concerned about.

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Mr. Ray has not been immunized from every type of prosecution in the world, and he still has his rights at this time. And to put him—telling him to testify—

THE COURT: But you're assuming Mr. Berg is going to ask him questions about things other than the transactions that are subject to these indictments and his relationship with the Noonses.

MR. SUSSMAN: I can't second-guess what Mr. Berg is going to ask.

THE COURT: I'm not going to assume that that is the case. Mr. Berg is not given leave to do that, and I'm not going to assume he's going to do that. But Mr. Ray is not exactly helpless. He is sophisticated enough—not to represent himself—none of us is—but at least to

know he needs to talk to his lawyer. I don't see why ready excess to counsel doesn't meet his needs rather than the disciosure in front of counsel.

MR. SUSSMAN: Well, the problem is his determination of what is relevant and what is not, his ability to object—this is a deposition, I guess. It's a one-sided deposition. You call it a deposition.

THE COURT: It is—what it is is a parallel proceeding to a statement given to the United States, and the Noonses need compulsory process under penalty of

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perjury, which is available to the government, to find out what their confidential agent is going to say about things that they do not want to discuss publicly yet. You are not entitled to be present when the Grand Jury stands in, but you are entitled to be available for consultation, as I understand it. Why is that any different?

MR. SUSSMAN: Well, I'm also concerned, Your Honor, about statements made in this hearing as being non-immunized.

THE COURT: Well, the Noonses can't grant immunity, so—

MR. SUSSMAN: I'm sorry, Your Honor?

THE COURT: I don't know the extent to which he has been immunized in the first place. But if he has, he believes, a privilege to a question asked by Mr. Berg, he needs to assert the privilege.

MR. SUSSMAN: It is premature at this point.

THE COURT: I'm having trouble with the concept that he's going to have some sort of privilege to his former client, other than some incrimination. I mean, obviously he doesn't have an attorney/client privilege about things that transpired between Mr. Ray and the Noonses. If there is something about which he is asked having to do with his relationship to them,

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which is incriminating, he needs to use his own judgment, which I assume would be take the Fifth Amendment.

Yes, sir.

MR. HINTON: May I say something, Your Honor?

THE COURT: Yes, sir.

MR. HINTON: Most respectfully, Judge Hughes, the last statement of your own, of the Court, is precisely the situation about which we, as Mr. Ray's counsel, are concerned. And that is, in the first instance we, of course, are submitting that this particular ruling of the Court is not authorized by the law.

THE COURT: I understand that.

MR. HINTON: But assuming that the Court is going to order that to occur, then what the Court does by the order of requiring Mr. Ray to subject himself to interrogation by able and learned counsel, Mr. Berg, under oath with his lawyers outside is that the Court is compelling him to act as his own counsel. And I would just represent to the Court that Mr. Ray is a business attorney, and that most—it is my impression that most of his activities does not involve acting as an attorney at all. And as we have represented and

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will continue to do so, we represent to the Court that it is extremely doubtful if there could ever be shown to have been an attorney/client privilege between these parties, Mr. Noons, brothers, and Mr. Ray. But be that as it may, though, if the Court makes him—

THE COURT: I certainly don't know that to be the case either way.

MR. HINTON: The Court was stating a while ago—

THE COURT: The only way they can find out whether they have a sustainable basis for asserting it is to find out—if Mr. Ray is telling the government under compulsion a story which would negate the attroney/client privilege, they need to know that now so that they—if they think that there is a story to the contrary they may produce those documents and witnesses. Again, I can't answer that, the ultimate question in advance.

MR. HINTON: Judge, I think—but again assuming the Court is ordering that proceeding to occur, to order that the questioning under oath proceed without his counsel is in the first place he does not waive his right to counsel, and he wants counsel. I can assure the Court that he needs counsel.

Secondly, I can assure the Court that he

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needs criminal counsel, and he does not and cannot waive his Fifth Amendment right to be questioned at this particular proceeding. There is nothing at all to prevent a

variety of activities encouraged by other prosecuting authorities against this man if he testifies in this proceeding and especially if he testifies without the benefit of counsel.

THE COURT: What kind of immunity has he been granted?

MR. HINTON: Well, I will let the government speak to that. I can assure the Court that there has been no formal proceeding granting immunity in this case.

THE COURT: Why are you talking about immunity? I am not giving anybody immunity.

MR. BRADDOCK: If I may speak to it, the government has given Mr. Ray use immunity for his testimony in cooperating in this case. The United States has given that to him. The immunity that he has is if he is called as a witness on behalf of the United States nothing that he says or that is derived from what he testifies to or information that he gives to an agent of the United States in the course of that investigation will be used against him. And that is the whole scope of immunity in this case.

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THE COURT: That sounds to me like that immunity will not cover what he tells the Noonses at this deposition.

MR. BRADDOCK: That's correct, Your Honor.

THE COURT: Mr. Berg.

MR. BERG: Your Honor, the immunity that he has is related to the transactions that are the basis of this indictment. The only worry that he has is if he lies under

oath. He has that under any circumstance, even the immunity that he has with the government.

As I understand the Court's order, I'm restricted to questions related to this transaction, which result from what we consider was a breach of his attorney/client relationship with the Noonses. What more can I ask about, except that which he has immunity from prosecution on, if Your Honor will pardon—

THE COURT: I'm not sure I understand the distinction here. Mr. Braddock says that he is only immuned if he is called as a witness by the United States for what he says then.

MR. HINTON: That's right.

THE COURT: Does that not cover the statement he has already given the government?

MR. SUSSMAN: There is a line of cases—

THE COURT: Well, let me--

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MR. BRADDOCK: Your Honor, the statement he has given now has been given to the United States. They have not been given to the defense counsel in response to that interview report.

THE COURT: But your statement was he was only immuned for his testimony when called as a witness.

MR. BRADDOCK: No, I said in the statement that he gave in connection with the cooperation with the United States' investigation of this case, on behalf of the United States. Now, in this case he's being requested on

behalf of defense, not on behalf of the United States. Now, if we have a hearing in open court, where the Court says—

THE COURT: I'm ordering him to do it under the authority of the United States.

MR. BRADDOCK: There may be a difference between the judicial and the executive branch, Your Honor, in that regard.

THE COURT: Same United States, though. There may be three branches of government, but there is one country.

MR. SUSSMAN: If it please the Court, there are some cases. I think the Supreme Court recently in a case called *Pillsbury*—and I don't have it with me, Your Honor—says even if a person is immunized if he

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testifies in a civil deposition or another proceeding on the same testimony, even though that testimony be ordered by Court, that testimony is not immunized.

THE COURT: This is not a separate proceeding.

MR. SUSSMAN: I'm just not so sure whether this testimony will be immunized, and that's my concern, Your Honor.

MR. BERG: Your Honor, if I might, the only thing he can talk about tomorrow, the only thing he can talk about tomorrow, as I understand the Court's order, is that from which he has been discharged from criminal responsibility. I can't indict him, and the government is not going to in this case no matter what he says, unless he lies under oath, as is in every case. And no matter

what he says about the attorney/client relationship that led to—what we call the attorney/client relationship—that led to an indictment based on what he said—Counts 1, 2 and 3, Counts 4 and 5—we say all stem from the attorney/client relationship.

THE COURT: Well, that's the problem I'm having here. Unless we assume he's going to say something different in the statement, the defense lawyers—categorically, he has already told the government; therefore, those disclosures are out in the immunity. Once he has disclosed all of these things to

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the government, he is immuned from prosecution. Only if he discloses something to Mr. Berg that he has not disclosed to the government, we run the risk of prosecution. To disclose something to Mr. Berg that he has not told the government, he probably has to have made a serious error in one place or the other. The stories can't be—his answers about, what did you say and what happened on these events described in the indictment when asked by Mr. Berg to be substantially different from those answers given—and it is all about the transactions given when Mr. Braddock interviewed him.

MR. SUSSMAN: To illustrate our point, Your Honor, let me just give the Court a hypothetical. Let's say, hypothetically, that the witness and the defendants were involved in committing a crime together. And let's say that Mr. Berg took the deposition that the Court is ordering in this case. What is—and that witness has the same immunity situation here. What is to prevent Mr. Berg—is that testimony—can that testimony not be used by any

other prosecuting authority or this prosecuting authority as a violation of the immunity agreement to prosecute the witness?

THE COURT: All right. Let's assume that we have a witness who has spoken to the government about

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three events which the government thinks are crimes. Let's assume that there is a fourth event unrelated to those three, three Seven Elevens and a Stop N Go, separate in time.

MR. SUSSMAN: Yes, sir.

THE COURT: These three problems I will get into. The only thing the witness could do when asked about the Stop N Go is take the Fifth Amendment, because if that's a separate transaction and it is not part of the disclosures made to the government, I take it that would not be immunized.

MR. SUSSMAN: My concern is that the disclosure is made to the government and whether or not in a separate deposition given to a third party.

THE COURT: He's not a third party.

MR. SUSSMAN: Well, he's not the government, and that's my concern.

THE COURT: The only reason the Noonses are with us is because of the government.

MR. SUSSMAN: Yes, sir.

THE COURT: By which you mean the executive. The executive has had their day in dealing with, as I under-

stand, three transactions. The Noonses are being allowed to their counsel in the proceeding in which he was granted immunity to inquire into those same

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transactions. That has all got to be covered by the grant of immunity. There are two things I can see happen. One is the Noonses know about a fourth transaction which would implicate Mr. Ray. We have discussed that. And then he has to do whatever he thinks is right about that.

The second problem can be that what he told the executive was A, and what he wants to tell the Noonses under oath is B. I'm not saying I don't know which is right and which is wrong. But the story is on the same transactions.

MR. SUSSMAN: A diversion.

THE COURT: Are significantly in conflict. Now, those are the only two problems I can see arising. One of them, there is no way that I can anticipate what other transactions they may have had which may be subject to prosecution. I don't want to know. I have enough problems.

The other is assumed in the cases on the subject, because he can be prosecuted for lying to either group. Whether he lies to the government or lies at the deposition is irrelevant. In neither case would it be immunized, because the immunity goes to prosecution for the substantive defenses he's discussing and not discussions, the false testimony.

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Yes, sir.

MR. HINTON: If I may come back then, Your Honor, to the situation is that by the Court ordering a deposition where the deponent has no counsel, has neither his own counsel or counsel for the side of a lawsuit for which he is to be a witness, he is being exposed, forced and compelled to act as his own counsel in a case where I can clearly represent to the Court is complicated, carries a plethora of possible criminal activities and criminal charges and criminal violations, both federal and state. So, he's not a lawyer, deprived of his right to counsel.

THE COURT: All of which has been discussed with the government.

MR. HINTON: Your Honor, there is no way that Mr. Braddock can stand here, even if he chose to do so, and tell Mr. Braddock—excuse me—tell Mr. Ray that he has got global immunity, because he doesn't have that authority. There is not a thing in the world to keep the Harris County District Attorney's Office or some other authority—and there are a multitude of possible authorities in this scenario—from prosecuting Mr. Ray.

And I again submit to the Court that he is being forced to give up his Fifth Amendment right and

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his Sixth Amendment right to counsel if he goes into that room alone. Plus the fact not only does he need his own counsel—

THE COURT: He is not charged and he is not being

tried, so the right to counsel doesn't attach yet, the Sixth Amendment right. I think he ought to have a lawyer. It is only right.

MR. HINTON: He does need an attorney.

THE COURT: These days we all need lawyers.

MR. HINTON: But the attorney/client privilege I think that the Court has based—and I don't mean to second-guess the Court, just from the Court's remark—and I have great personal respect for this Court and the Court knows that—that the Court is presuming that the special circumstance that exists, that is permitting the Court to order this most unusual situation is that there was in fact an attorney/client privilege. And I submit to the Court that there wasn't, and that he's not—and that is a matter than can be aired with the government counsel present and with Mr. Ray's own counsel present, because he does have some problems. And this is a complicated fact situation.

THE COURT: Well, does anybody—I don't know and would happily invite somebody to tell me whether under the circumstances that I have set up

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whether having Mr. Ray's counsel present for Mr. Ray's benefit would, in fact, waive the attorney/client privilege if the Noonses' lawyer asked the questions. I don't know the answer to that. I assume—I always assume that anything waives it unless somebody hesitates to the contrary.

MR. BERG: Very quickly, Your Honor. I was going to point out to the Court that we were concerned about a waiver, inasmuch as Mr. Ray is entitled to go out and

talk to his lawyers. One of the Court's—I thought the Court would make a finding or would agree that we were not waiving the right to counsel simply because Ray should have someone there to consult with. And I thought it was going to be in an area unrelated to the subject matter of the indictment. But whatever he talks about to Mr. Sussman and Hinton should be—I, first of all, don't think he should be allowed to talk to them. That puts me in a awkward position, because I think everybody needs a lawyer in a situation like this. But I don't want, number one, to be construed to have waived the attorney/client privilege because they can talk to Mr. Hinton and Mr. Sussman. But if they do, Mr. Hinton and Mr. Sussman ought not to be allowed to talk to anyone else on earth about whatever is spoken to—whatever Mr. Ray might tell them. The very point

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of this was to keep the government or anyone else, including Mr. Hinton and Mr. Sussman, from hearing what is essentially attorney/client privilege matters.

And Your Honor, one other comment—

THE COURT: We have a dilemma. Mr. Ray should not tell Mr. Sussman something that is a privilege.

MR. BERG: Yes, sir.

THE COURT: If he has done that, that's not a waiver by your viewpoint?

MR. BERG: No, sir.

THE COURT: It's a breach by him. But if they are present when you ask the question, it would seem to me that that produces a waiver.

MR. BERG: Yes, sir.

THE COURT: Now maybe it shouldn't under the circumstances, but I know of no authority—frankly I haven't spent a long time looking for it—it seems a fairly unusual circumstance.

MR. BERG: No one but the Noonses, who ought to be able to—be allowed to hear the questioning. It is their privilege. They are there to assist me.

THE COURT: They can tell you what they have told Mr. Ray, because that's a new lawyer.

MR. BERG: Yes, sir.

THE COURT: New attorney. Theoretically, Mr.

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Ray should not have told Hinton and Sussman what the Noonses told him. Now how they can confidently represent him without coming close to that is a difficult problem. Now if the Noonses had sued Mr. Ray for malpractice, that's a different question, because they're saying they are bringing the charges that are forcing the revelation.

MR. BERG: Or had they refused to pay their fees which are attached to the pleadings.

THE COURT: I have got a serious question about that.

MR. BERG: Yes, the really important matter.

THE COURT: No, I don't think there is a waiver if Mr. Ray goes out and says, they have asked me X; because of Y I don't want to answer that. That I don't

think would be a waiver. To have you-all sit there and listen to the disclosures between former counsel and existing counsel, I think it would be a waiver. And if I thought the Appellant Courts would listen to me, I would hold under these circumstances it is not a waiver, but I'm just not convinced that they would be bound by that conclusion.

MR. SUSSMAN: The problem is, Your Honor, we still have to represent Mr. Ray, and there is no way to do that, especially it sounds like what the Court is

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saying is what happens in this locked room with Mr. Berg and the Noonses and Mr. Ray can't be communicated to us. And if it can't—

THE COURT: Except to the extent it is the necessary predicate for legal advice.

MR. SUSSMAN: But if it can't be communicated to us, how can we advise Mr. Ray, and if it can be communicated to us outside the door, why can't we be inside the door? What's the difference?

THE COURT: Because maybe one out of thirty-five questions will trigger his need for counsel. And you know, Mr. Ray knows the transactions of the indictment. Mr. Berg knows them. You know them. That is what he's going to talk about. If there are independent grounds known to Mr. Berg, it would call for Mr. Ray to assert his privilege against incrimination. I don't expect you to go into those. I expect you to discuss in effect what has already been discussed with the government. That should never call for a privilege assertion.

MR. BERG: If I were in Ray's shoes, there may be spots where—given the ambit or just the circumstances in this indictment—if I questioned him knowing what I know, if I were Ray I might invoke the Fifth Amendment. I don't know. I don't know what he's

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going to do tomorrow. But what is at the heart of what we are talking about is that I'm doing nothing less than what the United States government does in a Grand Jury, as Your Honor pointed out. And at the same time in a Grand Jury, you can run out and talk to your lawyer, and he will have that right tomorrow.

I know as an officer of the Court what you expect of me. I can't promise that this will be over momentarily or as briefly as Mr. Ray might want, but the questions will be related to the indictment and the attorney/client privilege with Mr. Noons—Messrs. Noons. That is what we are here for.

THE COURT: Would you feel better about it to take it in the jury room, that it be taken in the jury room so that if anybody develops a concern about the progress that I would be readily available? Not that I have done a whole lot of help to you so far.

MR. BERG: Maybe in some other judge's jury room.

THE COURT: Maybe you would like to take it in Waxahachie and get far away from me.

I just don't know how I can slice the baby any thinner to protect Mr. Ray's legitimate interest and the Noonses' concern that they have a confidential agent who has already had this exercise,

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two of us with the government. And I think we will all agree, with one exception, that we are glad Mr. Berg is not the government. Ordinarily, you wouldn't need to do this, but under these circumstances with a double privilege involved I have got to let them ask about it without waiver. I don't mind putting them to the defense of the charges, but every time—I mean, this could very easily become a technique. You just charge clients or charge lawyers and take statements and immunize people, and I'm concerned for the attorney/client privilege.

MR. HINTON: Well, Judge, as the Court knows, conversations between any persons and a person that happens to have a bar card in his wallet are not privileged.

THE COURT: I understand your argument.

MR. HINTON: The aim is towards committing a crime.

THE COURT: And when I finally know some of the facts of this transaction, I may agree that you—conclusively, that there was no privilege and there was no confidential relationship at all. I just can't do that in advance.

MR. HINTON: He's being compelled to act as his own counsel in addressing this complicated—and I

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submit to the Court it is a complicated situation—and I again represent to the Court that there is no attorney/client privilege in the case that ever existed—but if he doesn't have counsel to answer these questions—and of

course it is the truth. He knows to tell the truth. But he, Your Honor—

THE COURT: His dilemma cannot be to the contrary.

MR. HINTON: Sir?

THE COURT: His dilemma may be that he has already made a statement to the government, which now he's faced with having to contradict. I'm not suggesting that I believe that. I am raising that as one of the multitude of difficult consequences that can come from this kind of proceeding.

MR. HINTON: Your Honor, hypothetically, I have known of clients who told the police officer they did not raelize they were speeding because their speedometer was broken and they told a lie. And then, after when the officer checked the speedometer they had a different reason for what they said that they were doing. That's why the man needs a lawyer. He needs counsel in any proceeding where he's going to be questioned about this case under oath, because he has serious, serious reasons to have counsel. And I think

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the Constitution affords him that right to counsel. I'm not trying to quarrel with the Court and go on through this over and over all day long. Judge, to put him in that room under oath with the David Berg Grand Jury, what we called it the other day in our discussions—that is pretty much what it is. I don't think the law, the Code of Criminal Procedures in the Federal Court, the statutes or anything that I know of in law authorizes Mr. Berg to have a one-man Grand Jury session with a government witness prior to trial. And most respectfully—

THE COURT: Without a court order quite like the one you got that that is absolutely true.

MR. HINTON: I'm stating to the Court, as Mr. Ray's counsel—and I have told this to Mr. Berg, in all due respect to my dear friend Mr. Berg—Mr. Ray does not wish to talk, does not wish to be interviewed under oath. But if the Court orders him, then I guess we will just have to see what happens next, Your Honor.

THE COURT: But it is pretty clear that the accused in this proceeding or the Noonses, and the Constitution affords them compulsory process for their defenses. His right not to want to talk to people is constrained, to some extent, by their right to compulsory process.

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MR. HILTON: Yes, Your Honor. But it does not overshadow, if the Court please, the Fifth Amendment.

THE COURT: I never said it did.

MR. HINTON: I understand, but Mr. Braddock does not have the authority to give this man global immunity. I don't know that there is such an animal, this global immunity.

MR. BERG: He has the only portion of the globe he needs, the form transaction and the consolidated transaction. And he's going to skate on those issues, and that is the very point we have made ten times.

THE COURT: The inquiry will be limited to the transactions described in the indictment and later statements to the government and those transactions. So, under those circumstances the Stop N Go extraneous

event problem should not arise. The inconsistency problem can always arise, but that's not unique to this dilemma.

All right. I will deny—I'm denying the motion to quash.

Is it desired that it be here? It doesn't offend me one way or the other. If somebody thought it would be helpful to do it here in the jury room instead of somewhere else—

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MR. SUSSMAN: Can I have a moment?

THE COURT: Certainly.

MR. BERG: Your Honor—

THE COURT: Wait a minute.

MR. HINTON: Your Honor, Judge Hughes, may we —in this most unusual situation may we respectfully ask this Court to put the ruling in the order in the written words so that we can talk to our client about it and counsel, and then we would certainly consent to have the deposition in either of our offices. We have known each other four years. That is no problem. If there is a question that does arise, we can see—

THE COURT: When is it scheduled?

MR. BERG: We have scheduled it for tomorrow morning and have the court reporter and videotape operator scheduled for our offices at 9:00.

MR. HINTON: Well, I can't do that, Your Honor, if the Court please. At 9:00 in the morning I have four

settings in Court. I don't know about Mr. Sussman so, if we could probably get a copy of the Court's order—

THE COURT: Are you suggesting that he doesn't work as hard as you?

MR. HINTON: Oh, no. I don't know what his schedule is in the morning, but I know that I have—

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there are certainly lesser courts, but there are courts and clients, Your Honor. We would like to have a chance to study the Court's order and consult with our client and decide on our course of action.

THE COURT: It is going to be very short and as identical to what I just said I could make it, if I can get Linda to type it.

MR. BERG: Sir, we noticed them last week of tomorrow morning, so they have had plenty of notice.

THE COURT: I think we can get the order here shortly. We need to go on with it. And part of putting it off may be the Court's fault because you know the Court was gone. This was as soon as I could get to it. But I think it needs to go forward in the morning. If 9:30 would be better, Mr. Berg will be reasonable about that. We will get you an order in the next day—we will get to it as soon as we can.

MR. BERG: Your Honor, Your Honor's comment—there is probably one person that will take exception to my being the government—Mrs. Duncan has informed me—has nothing to do with our payroll.

THE COURT: You have changed her mind.

MR. BRADDOCK: Your Honor, may I raise just one matter for the Court?

THE COURT: Yes.

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MR. BRADDOCK: For the purposes of this record, the United States was not party of record of the motion to quash that was filed by the attorneys for Mr. Ray. The government does obviously object to that proceeding. And I hope the copy the Court has received in chambers, the United States has filed a writ of mandamus with the Fifth Circuit and ask a stay of execution of the order while the Fifth Circuit considers that.

THE COURT: I don't know whether I have—have I got it?

THE LAW CLERK: Yes.

THE COURT: I did get it. Perhaps it would be cleaner if the government would just join Mr. Ray's motion to quash, and I will deny it too, rather than your not opposing their motion to quash.

MR. BRADDOCK: Well, we can certainly, you know, join in it. We would like to see it quashed as well.

THE COURT: Did you get any indication of when the Court of Appeals—

MR. BRADDOCK: My understanding is they had it, Your Honor, and I think before I came up for the hearing that they were talking about it. They had called back with a couple of questions. I don't know

exactly; in the meanwhile I went upstairs. I will check my messages and find out and I will notify you.

THE COURT: Did they give any thought to talking to the other side?

MR. BRADDOCK: I'm sorry?

THE COURT: Did they give any thought to talking to the other side?

MR. BRADDOCK: I understood they were going to call Mr. Berg.

MR. BERG: I have been in touch and talked to the Court. We have prepared our response already.

THE COURT: I wanted to move on. I'm not trying to pre-empt them. So whoever next talks to them, I am willing to defer the examination from tomorrow until Monday or so at the latest, but I'm not doing any of this four-months-while-they-think-about-it business. If they want to manage my docket, they can come down and manage it.

MR. BERG: If they do nothing, Your Honor, before 9:30 tomorrow morning, may we proceed?

THE COURT: Well, whichever or any of you who next talks to somebody with the Court of Appeals, if they would like for me to defer it for several days—because we are only talking about two more this week—I will put it off until Monday at the latest, if that

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will accommodate them. But if they want any more time than that, they are going to have to order me to do it.

MR. BRADDOCK: Yes, Your Honor.

THE COURT: All right. Thank you, Counsel.

MR. SUSSMAN: Thank you, Your Honor.

(Proceeding concluded at 2:35 P.M.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CERTIFICATE OF REPORTER

I, Linda D. Williams, Official Court Reporter, United States District Court, Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the above styled and numbered cause, and that said proceedings was later reduced to typewriting under my personal supervision, and the above and foregoing pages constitute a true and correct transcript thereof.

Given under my official hand this 23rd day of May, 1989.

/s/ LINDA D. WILLIAMS
Linda D. Williams
Official Court Reporter

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIM. NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

MOTION TO DISMISS INDICTMENT
OR TO SUPPRESS EVIDENCE OBTAINED BY
VIOLATING THE ATTORNEY/CLIENT PRIVILEGE

TO THE COURT:

Defendants Thomas Noons and Philip Noons ("the Noons") file this Motion to Dismiss Indictment or to Supress Evidence Obtained by Violating the Attorney/Client Privilege, pursuant to Fed. R. Evid. 104(a) and 501, and Supreme Court of Texas, Rules Governing the State Bar of Texas art. 10 § 9 (Code of Professional Responsibility), Canon 4.

FACTS

C. Marshall Rea is a local lawyer who has advised and represented the Noons concerning legal matters in the past. Neither defendant has waived his attorney-client privilege as to this or any other matter.

Counts 1, 2 and 3 of this indictment deal with the purchase of an asset ("the Forum note") from FSLIC

as receiver for Mainland Savings. Those counts are based almost entirely on privileged, confidential information that Rea provided to federal authorities, almost every word derived from his client, Thomas Noons. At the Noons' bond hearing conducted February 10, 1989, before U.S. Magistrate Calvin Botley, FBI agent William Cavanaugh admitted that Rea received legal fees from payments made on the Forum note.

During its investigation of this case, the government wired Rea with either a "body bug" or a transmitting device. After setting up his client Thomas Noons by requesting a meeting, Rea secretly tape recorded his privileged conversation. Rea also tape recorded telephone conversations with both clients.

AUTHORITIES

The remedy of dismissing an indictment should be invoked rarely, but the government's conduct in this case is so shocking to the "universal sense of justice mandated by the Due Process clause of the Fifth Amendment," that it should not be allowed to proceed to trial. *Hampton v. United States,* 425 U.S. 484, 96 S. Ct. 1646, 48 L.Ed. 2d 113 (1976); *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L.Ed.2d 366 (1973); *United States v. Tobias,* 662 F.2d 381, 387 (5th Cir. 1981).

The government exploited the attorney-client relationship between Rea and the Noons to obtain the information upon which the indictment is based. The evidence presented to the grand jury, especially as to Counts 1, 2 and 3, was obtained in violation of this privilege. *See, e.g., In re Grand Jury Proceedings,* 517 F.2d 666 (5th Cir. 1975). It was, therefore, inadmissible. Rule 501, Fed. R. Evid.

Attorney Rea cooperated with the government in violation of the Code of Professional Responsibility, Canon 4, which provides: "A lawyer should preserve the confidences and secrets of a client." His, and the government's, conduct deprived the Noons of their sixth amendment right to effective assistance of counsel. Further, it directly resulted in the return of this indictment against them.

When such improper conduct results in prejudice to the defendant, dismissal is the appropriate remedy. *See, e.g., United States v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987). There could be no greater prejudice than that suffered by the Noons: their indictment is a direct result of their lawyer's violation of their trust. The 11th Circuit's decision in *Ofshe* emphasized that the defendant did not suffer any prejudice because the government did not receive information to use against the defendant. Although it held that dismissal was not appropriate, the court was careful to note:

> (i)n reaching this decision . . . we must stress two points. First, our holding is based upon the unique facts of this case. Second, we do not condone the government's use of criminal defense attorneys as informants against their clients.

Id. at 1516.

The government's use of Attorney Rea as an informant against his clients provided the government with information to present to the grand jury for return of the indictment in this case.

REQUEST FOR RELIEF

The Noons request that this Court conduct a pretrial hearing to determine whether the prosecution obtained

information for this indictment from Mr. Rea by invading the privileged confidential relationship between attorney and client. This procedure is approved by the 5th Circuit. *United States v. Fortna,* 796 F.2d 724 (5th Cir. 1986).

Upon hearing, the Noons ask that the court dismiss the indictment against them or, in the alternative, disqualify Attorney Rea as a witness against them and suppress all evidence obtained from or by attorney Rea against them. The Noons also request that the court order such sanctions against the parties as it deems appropriate, and that the Noons have such further relief to which they may be entitled.

Respectfully submitted,

BERG & ANDROPHY

/s/ CHERI DUNCAN
David Berg
Fed. ID 2155
Cheri Duncan
Fed. ID 7829
3704 Travis
Houston, Texas
(713) 529-5622

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent certified mail, return receipt to all counsel of record on this the 3rd day of April, 1989.

/s/ CHERI DUNCAN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIM. NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

ORDER

The Court having heard Defendants' Motion to Dismiss Indictment or to Suppress Evidence Obtained by Violating the Attorney/Client Privilege, and being of the opinion that the motion is meritorious, hereby

ORDERS that the Motion to Dismiss Indictment is GRANTED. In the alternative, the Court

ORDERS that the Motion to Suppress Evidence is GRANTED.

SIGNED on this the ____ day of _____, 1989.

_____
Judge Presiding

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS L. NOONS

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS INDICTMENT OR TO SUPPRESS EVIDENCE

The United States of America by and through Henry K. Oncken, the United States Attorney for the Southern District of Texas, files the following response in opposition to the defendants' motion to dismiss the indictment or to suppress evidence obtained by violating the attorney/client privilege.

1. The defendants assert that the attorney-client privilege between the defendants and C. Marshall Rea was violated by the government in recording conversations between Rea, with his consent, and the defendants. The burden is on the defendants to establish both the existence of an attorney-client relationship with C. Marshall Rea and the confidential nature of the communications. See *United States v. Flores,* 628 F.2d 521, 526 (9th Cir. 1980), *United States v. Kelly,* 569 F.2d 928, 938 (5th Cir.), *cert. denied,* 439 U.S. 829, 99 S. Ct. 105, 58

L.Ed.2d 123 (1978). The attorney-client privilege attaches where "(1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer, (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *In re Grand Jury Proceedings,* 517 F.2d 666, 670 (5th Cir. 1975). " 'The grant of protection for such communications is designed to encourage clients to make full disclosure to their attorneys,' *Fisher v. United States,* 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order to enable the attorneys to provide sound legal advice." *In re Grand Jury Subpoena Duces Tecum dated September 15, 1983,* 731 F.2d 1032, 1036 (2nd Cir. 1984).

2. The government asserts that the evidence does not support the establishment of such an attorney-client privilege between the defendants and Rea concerning the transactions made the basis of this indictment. The evidence will establish that Rea was not approached by the Noons for "the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding. . . ." *In re Grand Jury Proceedings,* 517 F.2d at p. 670.

The government submits that the evidence will show that Rea was initially approached by defendant Philip

Noons concerning purchasing assets from the Federal Savings and Loan Insurance Corporation acting as the receiver for Mainland Savings Association (FSLIC). The evidence will show that Rea became involved in a fraudulent transaction with both the defendants to obtain a loan from FSLIC, using a Texas corporation, AMI Resources, Inc., of which Rea was the president, sole shareholder and incorporator, to actually purchase this loan from FSLIC. The evidence will further show that once the purchase was completed, AMI Resources, Inc. began receiving monthly payments on the loan and then disbursed them to the defendants through wire transfers out of the country. The evidence will be similar as to the transactions involving Rea, Consolidated Financial Corporation and Philip Noons in Counts Four and Five.

The Fifth Circuit has ruled that "[a]n attorney who acts as his client's business advisor, or his agent for receipt or disbursement of money or property to or from third parties . . . is not acting in a legal capacity. . . ." *United States v. Davis,* 636 F.2d 1028, 1044 (5th Cir. 1981), rehearing denied *United States v. Orr,* 645 F.2d 71, *cert. denied,* 454 U.S. 862, 102 S. Ct. 320, 70 L.Ed. 2d 162 (1981), citing *Colton v. United States,* 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied,* 371 U.S. 951, 83 S. Ct. 505, 9 L.Ed.2d 499 (1962); *Pollock v. United States,* 202 F.2d 281, 285-86 (5th Cir.), *cert. denied,* 345 U.S. 993, 73 S. Ct. 1133, 97 L.Ed. 1401 (1953). See also *In re Grand Jury Subpoena,* 831 F.2d 225, 228 (11th Cir. 1987). "The attorney-client privilege is not genuine where its only purpose is to gain confidentiality for the client or to use the lawyer as a mere conduit for the payment of money." *In re Grand Jury Subpoenas,* 803 F.2d 493, 499 (9th Cir. 1986). The attorney-client

privilege is triggered only by a client's request for legal, as contrasted with business advice. Such is not the case here as the evidence will show.

3. Assuming only for argument that some cognizable attorney-client relationship did emerge from Rea's meetings with the defendants in early 1988 (a fact the government does not concede), the subject matter of any such conversations then as well as any subsequent conversations would still not be privileged due to the application of the crime-fraud exception to the attorney-client privilege. Simply stated, the crime-fraud exception denies reliance on the attorney-client privilege if the ". . . legal representation was secured in furtherance of intended, or present, continuing illegality." *United States v. Harrelson,* 754 F.2d 1153, 1167 (5th Cir.), *cert. denied,* ____U.S. ____, 106 S. Ct. 599, 88 L.Ed.2d 578 (1985). As the Fifth Circuit has held, "[t]he privilege for communications between client and attorney ceases when the purpose of the privilege is abused, when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act." *United States v. Ballard,* 779 F.2d 287, 292 (5th Cir. 1986). *See also In re Grand Jury Proceedings in the Matter of Pavlick,* 680 F.2d 1026, 1028-29 (5th Cir. 1982) ('lawyers' skill may not be employed even without their knowledge, in furthering crimes). "It is beyond dispute that the attorney-client privilege does not extend to communications regarding an intended crime." *United States v. Gordon-Nikkar,* 518 F.2d 972, 975 (5th Cir. 1975) (attorney-client privilege does not extend to conversations concerning plans to commit perjury). *In re International Systems Controls Corp., Etc.;* 693 F.2d 1235, 1242 (5th Cir. 1982) (attorney-client privilege does not protect consulta-

tion for advice that will assist the client in carrying out a contemplated illegal or fraudulent scheme). Further, "[o]nce the party seeking disclosure makes a prima facie case that the attorney-client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded." *United States v. Ballard,* 779 F.2d at p. 292. Clearly, "[w]here a client seeks to use an attorney to further a continuing or future crime or fraud the broader public interest in the administration of justice is being frustrated, not promoted." *United States v. Dyer,* 722 F.2d 174 (5th Cir. 1983).

In this case, the evidence will show that Rea was a knowing participant in the fraudulent scheme devised by the defendants to obtain a valuable loan from FSLIC without paying what the loan was worth based on its true net realizable value. The scheme continued on after the loan was obtained by the defendants through AMI Resources, Inc. in that the monthly payments collected on that loan were to be remitted to the defendants by AMI Resources, Inc. The evidence will show that the defendants used Rea to shield from detection their involvement in this fraudulent scheme. Again the evidence will be similar as to the transactions involving Rea, Consolidated Financial Corporation and Philip Noons in Counts Four and Five.

Thus, what is involved in this case is an attempt by the defendants to employ the attorney-client privilege to shield the defendants from detection for their criminal actions. Clearly, assertion of this shield of attorney-client privilege in this case would frustrate the broader public interest in the administration of justice.

4. The defendants' assertion that they have been denied their Sixth Amendment right to effective assistance of counsel by the alleged violation of the attorney-client privilege (which the United States does not concede) is without merit. The ". . . Sixth Amendment right does not attach until 'at or after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States v. Fortna,* 796 F.2d 724 (5th Cir. 1986). Information obtained from and with the cooperation of Rea occurred prior to the filing of the criminal complaint in this case on February 7, 1989. Thus, there is no Sixth Amendment violation and consequently no prejudice. Defendant's reliance on *United States v. Ofshu,* 817 F.2d 1508 (11th Cir. 1989) is misplaced.

Even if only for argument's sake there was some cognizable Sixth Amendment right involved here, the Supreme Court has recently reaffirmed that "[a]n attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct." *Nix v. Whiteside,* ____U.S.____, 106 S. Ct. 988, 998 (1986) (right to counsel includes no right to have a lawyer who will cooperate with planned perjury). Additionally, the Texas State Bar Rules under Disciplinary Rule 7-102 (A)(7) clearly prohibits a lawyer in Texas while representing a client from counseling or assisting his client in conduct that he knows to be illegal or fraudulent. V.T.C.A. Government Code, Title 2, Subtitle G Appendix, Art. 10 § 9, State Bar Rules DR 7-102.

The United States, therefore, requests the Court to deny the defendants' motion to dismiss the indictment or to suppress evidence obtained by violating the attorney-clinet privilege after conducting a hearing on this issue.

Respectfully submitted,

HENRY K. ONCKEN
United States Attorney

By: /s/ JOHN R. BRADDOCK
John R. Braddock
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Government's Response to Defendants' Motion to Dismiss Indictment or to Suppress Evidence was mailed postage prepaid to David Berg, attorney for the defendants, 3702 Travis, Houston, TX 77002 on this 14th day of April, 1989.

/s/ JOHN BRADDOCK
John R. Braddock
Assistant United States Attorney

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIM. NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

(Filed April 12, 1989)

MOTION TO TAKE EX PARTE
DEPOSITION UNDER SEAL

COME NOW THOMAS AND PHILIP NOONS, Defendants, who request permission to take a sealed, ex parte deposition of C. Marshall Rea, pursuant to Rule 15, Fed. R. Crim. Proc. and 28 U.S.C. § 1651, for the following reasons:

I.

When, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness of a party be taken, the Court may, upon motion of such party and notice to the parties, order the testimony of such witness to be taken by deposition, and that any designated book, paper, document, record or other unprivileged material be produced at the same time and place. The decision whether to authorize depositions pursuant to this rule is committed to the discretion of the

trial judge. *United States v. Mills,* 760 F.2d 1116, 1120 (11th Cir. 1985).

II.

Federal authorities "wired" an attorney, C. Marshall Rea, to enable him to secretly tape record the Defendants, his clients. The government unilaterally decided that Rea's relationship with the Defendants is not privileged, notwithstanding FBI Agent William Cavanaugh's sworn testimony at a Feb. 10 bond hearing, that Rea received legal fees related to the purchase of the Forum note (Counts 1, 2, 3); Rea's production of a check for $3000.00 for "legal fees" pursuant to subpoena ducus tecum (attached); and a report in the *Houston Chronicle,* admittedly hearsay, that Rea invoked the lawyer-client privilege when first questioned about the Noons (attached).

As with war and generals, the decision whether there was a lawyer-client relationship between Rea and the Defendants is too important to be left to the prosecution. The defense wants to question Rea alone immediately regarding (1) his relationship with the Noons, (2) what he told the government about them and (3) all matters pertinent to this case.

III.

Robert Sussman, lawyer for Rea, has informed defense counsel that Rea refuses to be interviewed by us unless AUSA John Braddock is in attendance. The government, however, has already unlawfully trespassed on the lawyer-client relationship, indicted the Defendants and subjected them to public humiliation. No one, not even Rea's

lawyers should be allowed to attend the deposition with him. If the defense is wrong, then nothing has been lost but some of Mr. Rea's time. If the defense is correct, strangers to the attorney-client privilege will have been precluded from further unlawful invasion of the Defendants' confidences. Finally, it should be noted that no legal harm can come to Mr. Rea if he testifies honestly: he is only a witness and, having been given immunity from prosecution, he has no privilege against testimony unrelated to the lawyer-client privilege.

IV.

Therefore, the defendants request the Court to order C. Marshall Rea to appear by himself at a time and place designated by defense counsel, to give deposition testimony under seal and not to disclose the contents of that deposition to any other person, until further order of the Court.

Respectfully submitted,

BERG & ANDROPHY

/s/ DAVID BERG
David Berg
Fed. ID No. 2155
3704 Travis
Houston, TX 77002

Counsel for Defendants,
Philip and Thomas Noons

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion To Take Ex Parte Deposition Under Seal was mailed to AUSA John Braddock and Robert Sussman today, April 11, 1989.

/s/ DAVID BERG
David Berg

AMI RESOURCES, INC.

No. 503

April 6 19 88 55-80/1130

PAY TO THE ORDER OF C. Marshall Rea $ 3,000.00

Three thousand and no/100---------- DOLLARS

Texas Commerce Bank Houston

LAKESIDE
10411 WESTHEIMER
P.O. BOX 42370
HOUSTON, TEXAS 77242-2370

FOR Legal Fees

C. Marshall Rea

(4010) ⑆113000609⑆ ⑈0180007 1068⑈

72a

Exhibit

CMR 14 1

Feds knew tapes might be unethical, sources say

By BOB SABLATURA
Houston Chronicle

FBI investigators and federal prosecutors were aware that secret tape recordings they arranged in a bank fraud case might constitute an ethical violation of the attorney-client privilege, according to court documents and sources close to the investigation.

Houston attorney C. Marshall Rea secretly taped a series of conversations with his clients in return for immunity from prosecution in the alleged fraud scheme, Houston defense attorney David Berg has charged.

When Rea was first approached by FBI agents last fall and asked about financial transactions involving Philip S. and Thomas F. Noons, two brothers later indicted on fraud charges, Rea refused to comment, citing an attorney-client privilege, a source close to the fraud probe said.

After he was granted immunity, the source said, Rea agreed to cooperate in the federal investigation.

Part of that cooperation involved recording conversations with the Noons brothers, who were dealing with him on an attorney-client basis, said Berg, who represents the Noons brothers.

"My clients placed a great amount of trust in Mr. Rea," Berg said. "They were talking to him as their attorney."

Federal court records also reflect that FBI investigators were aware that Rea was receiving payments that he regarded as fees for his legal services in the case.

At a bond hearing several days after the brothers' arrest, FBI special agent William C. Cavanaugh repeatedly described "legal fees" and "attorney fees" that Rea deducted from financial transactions before passing on the proceeds to the two brothers.

Berg has asked a federal judge to dismiss the indictment because the taping constituted governmental misconduct.

U.S. District Judge Lynn N. Hughes ordered U.S. marshals to seize Rea's files and records Tuesday in an apparent effort to determine the extent of the attorney-client relationship.

U.S. Attorney Henry Oncken has discounted the allegations of misconduct, but has refused to discuss details of the case.

FBI spokesman Johnie Joyce would not discuss details of the Noons investigation, but offered a general denial of the charges.

"The FBI does not overhear or record privileged conversations between lawyers and their clients," he said in a statement.

Berg said prosecutors have informed him that telephone conversations, as well as face-to-face meetings, were captured on tape by Rea. At least one of those conversations was recorded by a "body bug" or some other device worn on Rea's body, he said.

The February indictment reflects a series of conversations between Rea and Thomas and Philip Noons between Jan. 19 and Feb. 7, 1989. The brothers were arrested soon thereafter.

Rea allegedly deceived his two clients when confronted with questions about his cooperation with investigators.

Berg, retained by the Noons last fall after they became aware of the federal investigation, said he became suspicious that Rea was cooperating with FBI agents late last year and so informed his clients. At the time, Rea represented the Noons brothers in connection with some transactions that are connected to the fraud indictment.

During one of the conversations that may have been taped, Berg said, Thomas Noons asked Rea if he was cooperating with the government and if the conversation was being recorded. Rea reportedly answered no to both questions.

Philip Noons, a former asset manager with the Federal Savings and Loan Insurance Corp., is charged with rating Mainland Savings Association loans at less than their true value and selling them to two companies in which he and his brother hold an equity interest.

BEST AVAILABLE COPY

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO TAKE EX PARTE DEPOSITION UNDER SEAL

The United States of America, by and through Henry K. Oncken, the United States Attorney for the Southern District of Texas, files this response to defendants' motion to take ex parte deposition under seal.

1. Rule 15, Fed. R. Crim. P., controls the taking of criminal depositions. Rule 15(a) states, in pertinent part as follows:

> Whenever due to *exceptional circumstances* of the case it is in the interests of justice that the testimony of a *prospective witness of a party* be taken and preserved for use at trial, . . . the Court *may* . . . order that testimony of such witness be taken by deposition. . . . (Emphasis added)

The Notes of the Advisory Committee on the 1974 Amendments to Rule 15 state that "[s]ubdivision (a)

also makes explicit that only the 'testimony of a prospective witness of a party' can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness." There have been no substantive changes to Rule 15(a) since the 1974 amendments. Case law has further confirmed that Rule 15 does not contemplate use of depositions of adverse witnesses as discovery tools in criminal cases. *See, United States v. Fischel,* 686 F.2d 1082, 1091 (5th Cir. 1982); *In Re Eisenberg,* 654 F.2d 1107, 1113 n.9 (5th Cir. 1981). The defendants' request in this case is clearly an attempt to obtain discovery of an adverse witness's testimony prior to trial, which is not permitted.

2. The defendants' have not made a requisite showing under Rule 15(a) that there are "exceptional circumstances" requiring the taking of C. Marshall Rae's deposition to preserve it for use at trial. There has been no showing that Rea will be unavailable for trial or any hearings the Court may set. Clearly, he can be subpoenaed to appear as can any other witness. Thus, there is no necessity for a deposition of Rea to preserve his testimony for use at trial.

3. Finally, the defendants' request an *ex parte* deposition of Rea. There is clearly no provision anywhere in Rule 15 for such an *ex parte* deposition of any prospective witness.

The United States therefore requests this Court to deny the defendants' motion for an *ex parte* deposition of C. Marshall Rea under seal.

Respectfully submitted,

HENRY K. ONCKEN
United States Attorney

By: /s/ JOHN R. BRADDOCK
John R. Braddock
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Government's Response to Defendants' Motion to Take Ex Parte Deposition Under Seal was mailed postage prepaid to David Berg, attorney for the defendants, 3702 Travis, Houston, TX 77002 on this 17th day of April, 1989.

/s/ JOHN BRADDOCK
John R. Braddock
Assistant United States Attorney

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Crim. No. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP AND THOMAS NOONS

DEFENDANTS' REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO TAKE EX PARTE DEPOSITION

TO THE HONORABLE COURT:

PHILIP AND THOMAS NOONS ("the Noons"), Defendants, file this reply to the government's response to their motion to take ex parte deposition under seal, and would show the court:

I.

On April 12, 1989, the Noons filed a motion to take a sealed, *ex parte* deposition of Attorney C. Marshall Rea, pursuant to Rule 15, Fed. R. Crim. P. and 28 U.S.C. § 1651. In its response, the government argues that the Noons' request is an effort to obtain discovery of an adverse witness' testimony in a criminal case, which is not permitted by Rule 15.

II.

The government claims that Mr. Rea is adverse to the defendants, as if he had wandered in off the streets and

volunteered to turn against his clients. Rea gave information about the defendants only after the government pressured him to do so, almost certainly with an offer of immunity. The government assumes that because Mr. Rea has succumbed to its pressure, he now is their witness. This assumption is incorrect. "(Courts) have recognized the principle that witnesses in a criminal prosecution belong to no one . . ." *United States v. Carrigan,* 804 F.2d 599, 603 (10th Cir. 1986).

Prima facie proof that Rea was acting as the Noons' counsel has been provided by the government. On Feb. 10, 1989, at a bond hearing, FBI Special Agent William Cavanaugh testified that Rea received legal fees from the Forum transaction. The subpoena duces tecum for Mr. Rea's Forum file, served on April 3, 1989, yielded a check for $3000.00 marked "legal fees." (see attached check) When he was first approached by the FBI regarding the transactions made the basis of this indictment and about the Noons, he invoked the lawyer-client privilege and refused to cooperate (attached affidavit of Thomas Noons), a fact apparently verified by the Houston Chronicle. (see attached article)

Now there is much more proof. On Friday, April 28, 1989, AUSA John Braddock turned over tape recordings secretly made by Rea, primarily of Thomas Noons, exactly as the defense has alleged. (Transcripts transcribed thus far are attached under seal)

The recordings are a paean to failed entrapment. On the first tape, October 4, 1988, Rea discusses with Thomas Noons the government subpoena issued to him for records related to AMI, a corporation Rea owns. (transcript attached) On this tape, Rea clearly is trying to get Noons to tell him to do something unlawful with respect

to the subpoena. Instead, Noons says, "Yeah, but—I mean you have done nothing illegal, Marshall. I mean they can subpoena bank records."

Later, on Jan. 25, 1989, Rea lures Thomas Noons to a meeting in which he is outfitted with a body mike. (transcript attached) Rea states that he has just seen Hinton & Sussman, attorneys whom Rea had been consulting about the Consolidated and Forum transactions, and talked to them about tax consequences relative to the Forum transaction, but adds:

> I did not talk to them about anything else, because it is just not appropriate.

It wasn't appropriate because of the lawyer-client privilege. There was no other reason for him to withhold information from his own lawyers.

Rea also says that he still doesn't know what is illegal about the Forum transaction and then dispenses legal advice to Thomas Noons about various matters such as the potential for forfeiture of the Forum funds under the RICO statute, a foreign trust account about which he has been advising Noons for some time and other matters Rea verifies are protected by the lawyer-client relationship.

III.

The government's pressure has done more than interfere with the attorney-client relationship: it has prevented the Noons from interviewing a potential witness and has precluded them from developing an "advice of counsel" defense. Mr. Sussman has informed defense counsel that Rea will not talk to the defense unless Mr. Braddock

is present. Only an *ex parte* deposition affords the defendants the protection they need against further compromises of their legal confidences.

The government has a difficult problem in unilaterally deciding there was no lawful lawyer-client privilege available to the defendants. The Noons are foreigners who were dealing with a lawyer, C. Marshall Rea, who holds himself out as an expert in taxation and foreign financial transactions. The transactions made the basis of this indictment, insofar as they involve Rea, also involve his area of legal expertise. This is not a matter of lawyer and client plotting a murder, about which there can be no doubt. It was a complicated foreign transaction that required legal advice, exactly the kind Rea has been dispensing his entire career. The conclusion that there was no legitimate lawyer-client privilege is at best, dubious, and, at worst, an obstruction of justice. Just who authorized the invasion into this privileged relationship—Rea, his lawyers or the government—must be determined. *U.S. v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987).

IV.

Even if there were no Rule 15, this court has inherent power to order a deposition pursuant to its authority to control the conduct of its trials and impose sanctions in connection with its supervisory powers. *See United States v. Carrigan,* 804 F.2d at 599. In *Carrigan,* the court refused to vacate on mandamus a trial judge's pretrial order directing that criminal defendants be allowed to depose prospective government witnesses. The trial court had found that the government improperly interfered with defense counsel's access to those witnesses. The present case involves an even more compelling argument for a pretrial deposition.

V.

Neither of the cases upon which the government relies comes close to confronting the type of issue raised by this case and, to a lesser degree, by *Carrigan*. In *United States v. Fischel,* the government simply had failed to disclose an informant's address to the defendants. *United States v. Fischel,* 686 F.2d 1082 (5th Cir. 1982). In *Re Eisenberg,* the appeal rose from a request for a pre-indictment deposition of a government informant. In both cases, the discussion of Rule 15's limits is dicta.

VI.

In the interest of justice, the Noons ask that the court grant their request in this exceptional circumstance, and grant them such further relief to which they may be entitled, and that nothing herein be construed as a waiver of their lawyer-client relationship with Marshall Rea.

Respectfully submitted,

BERG & ANDROPHY

By: /s/ CHERI DUNCAN
David H. Berg
Fed. ID No. 2155
Cheri Duncan
Fed. ID No. 7829
3704 Travis Street
Houston, TX 77002
(713) 529-5622

Counsel for Defendants,
Philip and Thomas Noons

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Reply to Government's Response to Motion to Take Ex Parte Deposition has been hand delivered to the Assistant U.S. Attorney in this matter on this the 1st day of May, 1989.

/s/ CHERI DUNCAN

AFFIDAVIT

My name is Thomas F. Noons. I am over 18 years of age, have never been convicted of a criminal offense, am competent to make this affidavit, and have personal knowledge of the facts contained herein. By making this affidavit, I do not waive any Fifth Amendment or attorney-client privileges as to any other statements or conversations.

In August or September, 1988, C. Marshall Rea met with me at the What-A-Burger in the Memorial City Mall and told me that two special agents from the FBI had been to see him: Bill Cavanaugh and Doug Drilling. He said that they told him that they wanted to ask some questions relating to certain FSLIC transactions and particularly about companies called Consolidated and AMI Texas.

Marshall Rea told me that the FBI asked him if he had any relationship with Philip Noons, myself or my wife, Toyia. He said that he told them that he knew me and Philip but that he did not know Toyia, and that he had known us for some time. He told me that he told the FBI agents that we were clients of his and had been for some time.

He told me that he advised the agents that he could not answer any questions about Philip and me because he is an attorney and his relationship with us was confidential.

FURTHER AFFIANT SAYETH NOT.

/s/ THOMAS F. NOONS
Thomas F. Noons

SUBSCRIBED AND SWORN TO BEFORE ME by the said THOMAS F. NOONS on this the 1st day of May, 1989, to certify which witness my hand and seal of office.

/s/ SHEILA ENGLADE
Notary Public, State of Texas

/s/ SHEILA ENGLADE
(printed name of notary)
Commission Expires 10-19-92

AMI RESOURCES, INC. No. 503

April 6 19 88 35-60/1130

PAY TO THE ORDER OF C. Marshall Rea $ 3,000.00

Three thousand and no/100---------- DOLLARS

Texas Commerce Bank Houston

LAKESIDE
10411 WESTHEIMER
P.O. BOX 42370
HOUSTON, TEXAS 77242-2370

FOR Legal Fees C. Marshall Rea

(4010) ⑈113000609⑈ ⑆018000710688⑆

84a

Exhibit
CMR 14 1

Friday, April 7, 1989 Houston Chronicle ★★★ 31A

Feds knew tapes might be unethical, sources say

By BOB SABLATURA
Houston Chronicle

FBI investigators and federal prosecutors were aware that secret tape recordings they arranged in a bank fraud case might constitute an ethical violation of the attorney-client privilege, according to court documents and sources close to the investigation.

Houston attorney C. Marshall Rea secretly taped a series of conversations with his clients in return for immunity from prosecution in the alleged fraud scheme, Houston defense attorney David Berg has charged.

When Rea was first approached by FBI agents last fall and asked about financial transactions involving Philip S. and Thomas F. Noons, two brothers later indicted on fraud charges, Rea refused to comment, citing an attorney-client privilege, a source close to the fraud probe said.

After he was granted immunity, the source said, Rea agreed to cooperate in the federal investigation.

Part of that cooperation involved recording conversations with the Noons brothers, who were dealing with him on an attorney-client basis, said Berg, who represents the Noons brothers.

"My clients placed a great amount of trust in Mr. Rea," Berg said. "They were talking to him as their attorney."

Federal court records also reflect that FBI investigators were aware that Rea was receiving payments that he regarded as fees for his legal services in the case.

At a bond hearing several days after the brothers' arrest, FBI special agent William C. Cavanaugh repeatedly described "legal fees" and "attorney fees" that Rea deducted from financial transactions before passing on the proceeds to the two brothers.

Berg has asked a federal judge to dismiss the indictment because the taping constituted governmental misconduct.

U.S. District Judge Lynn N. Hughes ordered U.S. marshals to seize Rea's files and records Tuesday in an apparent effort to determine the extent of the attorney-client relationship.

U.S. Attorney Henry Oncken has discounted the allegations of misconduct, but has refused to discuss details of the case.

FBI spokesman Johnie Joyce would not discuss details of the Noons investigation, but offered a general denial of the charges.

"The FBI does not overhear or record privileged conversations between lawyers and their clients," he said in a statement.

Berg said prosecutors have informed him that telephone conversations, as well as face-to-face meetings, were captured on tape by Rea. At least one of those conversations was recorded by a "body bug" or some other device worn on Rea's body, he said.

The February indictment reflects a series of conversations between Rea and Thomas and Philip Noons between Jan. 19 and Feb. 7, 1989. The brothers were arrested soon thereafter.

Rea allegedly deceived his two clients when confronted with questions about his cooperation with investigators.

Berg, retained by the Noons last fall after they became aware of the federal investigation, said he became suspicious that Rea was cooperating with FBI agents late last year and so informed his clients. At the time, Rea represented the Noons brothers in connection with some transactions that are connected to the fraud indictment.

During one of the conversations that may have been taped, Berg said, Thomas Noons asked Rea if he was cooperating with the government and if the conversation was being recorded. Rea reportedly answered no to both questions.

Philip Noons, a former asset manager with the Federal Savings and Loan Insurance Corp., is charged with rating Mainland Savings Association loans at less than their true value and selling them to two companies in which he and his brother hold an equity interest.

BEST AVAILABLE COPY

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS

THOMAS F. NOONS

MOTION TO QUASH ORDER COMPELLING WITNESS TO TESTIFY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, C. MARSHALL REA, by and through his attorneys, MICHAEL J. HINTON and ROBERT J. SUSSMAN, and moves this Honorable Court to quash the private deposition ordered in the above-styled case.

For reason, Movant would show:

I.

Movant wishes to make clear to this Honorable Court that he is represented by counsel and would invoke his right to counsel under the Sixth Amendment of the United States Constitution at every stage of these proceedings including the deposition ordered.

Secondly, counsel for Movant has told David Berg, counsel for the NOONS brothers, that Mr. REA would

not consent to be interviewed or discuss this case with Mr. Berg. Further, Mr. REA does not voluntarily consent or acquiesce to the taking of such a deposition. He will, of course, comply with any lawful order of this or any other court.

II.

The Court's Hybrid Order is Not Permitted by Law

Counsel for the NOONS brothers moved for this deposion "pursuant to Rule 15 of the Federal Rules of Criminal Procedure." However, the order that was issued on May 3rd, 1989 by this Honorable Court does not follow the requirements of Rule 15 in that it does not comply with Section (d) of that rule which states:

> The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

In this case, a Rule 15 deposition has apparently been ordered that bars not only the Government from that proceeding, but also the witness' own counsel.

Further, there has not been the required showing (and, in fact, the opposite is the case) that the prospective witness is willing to give a deposition. *United States v. Whiting,* 308 F.2d 537 (2nd Cir. 1962); *United States v. Ausmeier,* 5 F.R.D. 395 (E.D.N.Y. 1946); *United States v. Birrell,* 276 F.Supp. 798, 823 (S.D.N.Y. 1967); *United States v. Fiqueroa,* 298 F.Supp. 1215, 1216 (S.D.N.Y. 1969).

The Order is not based on any provision in the Federal Rules of Criminal Procedure, any federal statute or any case applicable to the facts herein.

There is no basis in law for such an order and Movant strenuously objects.

III.

If Proceeding is Not Rule 15 Deposition, Then it is the Taking of the Statement of a Witness

It is Movant's understanding that at the hearing on the Motion to Take Ex Parte Deposition Under Seal, there was some discussion that this might not be a deposition under Rule 15. If it is not, then it is the simple taking of a witness' statement. Any witness has the right to refuse to give a statement to either party in a criminal case. It is well-settled law that a witness for either side does not have to talk to lawyers who represents a party if he chooses not to.

Mr. Rea again, through counsel, declines to be interviewed voluntarily by Mr. Berg or the NOONS brothers.

IV.

No Attorney-Client Privilege Has Been Shown

The two attachments to Mr. Berg's Motion to Take Ex Parte Deposition Under Seal, which he insists are proof of an on-going attorney-client relationship between C. Marshall Rea and the NOONS brothers are quite misleading. The newspaper article cites an unnamed "source close to the fraud probe" as saying that Rea told another unnamed individual that he could not comment on the case because of an attorney-client privilege. Nowhere in the article does it allege that the client referred to was the NOONS brothers.

Similarly, the check attached to the NOONS brothers' motion which was previously produced by Mr. Rea pur-

suant to the subpoena duces tecum is a check not from the NOONS brothers but from AMI Resources, Inc., a Texas corporation in which the NOONS brothers are neither shareholders nor officers.

Whether or not an attorney-client relationship existed between Marshall Rea and the NOONS brothers and whether or not, if there ever was that relationship, the activities of TOM and PHILIP NOONS as well as those of Marshall Rea fall within the crime-fraud exception to that privilege, are issues that can be addressed in a forum authorized by federal statutes.

V.

The Scope of Inquiry in the Court's Order Is Impermissibly Vague, Over-broad and Open-ended

In Mr. Berg's motion, he asks for permission to interrogate Mr. Rea regarding,

> "(1) His relationship with the Noons;
>
> (2) What he told the Government about them; and
>
> (3) All matters pertinent to this case."

What Mr. Berg or the NOONS brothers may believe to be pertinent to this case, coupled with the Court's order that he be compelled to testified "for the limited purpose of discovery" places no relevancy boundaries on the scope of this examination. This fact, coupled with the fact that Mr. Berg, Mr. Rea and a court reporter will be the only three individuals in the room, makes for an almost impossible situation for the deponent.

WHEREFORE, PREMISES CONSIDERED, the Witness, through counsel, asks this Honorable Court to quash

the order compelling him to testify under oath without the government present.

Respectfully submitted,

HINTON, SUSSMAN & BAILEY

/s/ MICHAEL J. HINTON
Michael J. Hinton, FID 7469

/s/ ROBERT J. SUSSMAN
Robert J. Sussman, FID 2822
5300 Memorial Dr., Ste. 1000
Houston, Texas 77007
(713) 864-4477

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Quash Order Compelling Witness to Testify has been served on John Braddock, Assistant United States Attorney, 515 Rusk, Houston, Texas 77002 and David Berg, Berg & Androphy, 3704 Travis, Houston, Texas 77002 on this 9th day of May, 1989.

/s/ ROBERT J. SUSSMAN
Robert J. Sussman

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

ORDER

ON this day, came on to be heard Movant's Motion to Quash Order Compelling Witness to Testify and the Court, after due consideration of same, is of the opinion that said motion be in all things GRANTED/DENIED.

SIGNED and ORDERED this _____ day of May, 1989.

_____
Judge Presiding

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP S. NOONS
THOMAS F. NOONS

RESPONSE TO MOTION TO QUASH

I.

THE PRIMA FACIE PROOF OF THE ATTORNEY-CLIENT RELATIONSHIP IS ANYTHING BUT "MISLEADING"

Mr. Rea response does not refute the defendants' prima facie evidence of the lawyer-client relationship. Rea misquotes the Houston Chronicle article, which reported that he invoked the attorney-client privilege when approach by the FBI about the Noons. He never mentions the affidavit of Thomas Noons, which details Rea's admission that he invoked the privilege. He does not say that he did not invoke the privilege precisely as we allege, nor has the prosecution or FBI denied we are correct, nor will they, ever. Rea also asserts that the check for legal fees was drawn on funds from AMI Resources, Inc., not from the Noons brothers. What Mr. Rea does not say is that he is the sole director (exhibit A) and shareholder of AMI Resources, Inc.; that the AMI money

for fees came from payments made on the Forum note; and, that slowly but surely, the defense is being provided with proof of additional payments marked "legal fees." (Exhibit B) Rea does not deny that he took legal fees from the Forum transaction, which is smart, because FBI Agent William Cavanaugh already admitted it, under oath. (Exhibit C)

II.

REA'S DISCUSSION OF THE LAW IS MISLEADING

Rea's discussion of the law is inaccurate. He ignores this court's inherent power, apart from Rule 15, to control the conduct of its trials. *See United States v. Carrigan,* 804 F.2d 599 (10th Cir. 1986). Rea also suggests that the Noons must show that he is willing to give a deposition under Rule 15. This is not the law. The cases upon which Rea relies were decided prior to the amendment of Rule 15 in 1974. They construe the former version of the rule, which required a defendant to prove the materiality of the evidence that he sought to obtain by deposition. *See, e.g., United States v. Whiting,* 308 F.2d 537 (2d Cir. 1962). Further, he cites no Fifth Circuit authority, either pre- or post-amendment, in support of this proposition.

For these reasons, the Noons respectfully ask this Court to deny C. Marshall Rea's motion to quash.

Respectfully submitted,

BERG & ANDROPHY

David Berg
Fed. ID #2155
Cheri Duncan
Fed. ID #7829

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that this reponse has been hand delivered to all counsel of record today, May 10, 1989.

David Berg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Crim. No. H-89-92

UNITED STATES OF AMERICA

v.

PHILIP AND THOMAS NOONS

ORDER

The Court having heard Defendants' Response to Motion to Quash, and being of the opinion that Defendants' response is meritorious, hereby

ORDERS that the motion is DENIED.

SIGNED this the ____ day of _____, 1989.

_____
Judge Presiding

THE STATE OF TEXAS

SECRETARY OF STATE

CERTIFICATE OF INCORPORATION
OF

AMI RESOURCES, INC.

CHARTER NO. 786450

The undersigned, as Secretary of State of the State of Texas, hereby certifies that Articles of Incorporation for the above corporation duly signed and verified pursuant to the provisions of the Texas Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Certificate of Incorporation and attaches hereto a copy of the Articles of Incorporation.

Dated FEB. 19, 1986.

/s/ Signature Illegible
Secretary of State

dae

(Filed February 19, 1986)

ARTICLES OF INCORPORATION OF AMI RESOURCES, INC.

ARTICLE ONE

The name of the Corporation is AMI RESOURCES, INC.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose for which the Corporation is organized is the transaction of any and all lawful business for which a corporation may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the Corporation shall have authority to issue is One Hundred Thousand (100,000). The shares shall have no par value.

ARTICLE FIVE

The Corporation will not commence business until it has received consideration equal to or exceeding the value of $1,000.00, consisting of money, labor done, or property actually received, for the issuance of its shares.

ARTICLE SIX

The street address of its initial Registered Office, and the name of its initial Registered Agent at this address is as follows:

C. Marshall Rea
1155 Dairy Ashford, Suite 703
Houston, Texas 77079

ARTICLE SEVEN

The number of initial Directors is one (1). The name and address of the initial Director is:

C. Marshall Rea
1155 Dairy Ashford, Suite 703
Houston, Texas 77079

ARTICLE EIGHT

The name and address of the Incorporator is:

Marilyn S. Hershman
712-A, East 26th Street
Austin, Texas 78705

IN WITNESS WHEREOF: I have hereunto set my hand this ____ day of _____, 19____.

_____
Marilyn S. Hershman, Incorporator

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me this the ____ day of _____, 19____, to which witness my hand and seal of office.

/s/ ERIC C. BRAMLETT
Notary Public In and For
The State of Texas

My commission expires:
Aug. 29, 1988

(SEAL)

from the FSLIC?

A. Yes, sir, it did.

Q. Do you know about approximately what date that was?

(Pause)

A. March the 18th, 1988.

Q. And did that purchase take place here in Houston, Texas?

A. Yes, sir.

Q. After that purchase took place, do you know whether or not from your investigation the Forum loan and all its documents were transferred to anyone?

A. They were transferred to Mr. Rey.

Q. And have you learned that subsequent to that transfer to Mr. Rey whether or not Mr. Rey received any payments on that Forum loan?

A. He did.

Q. And where were those payments received?

A. At a P.O. box here in Houston.

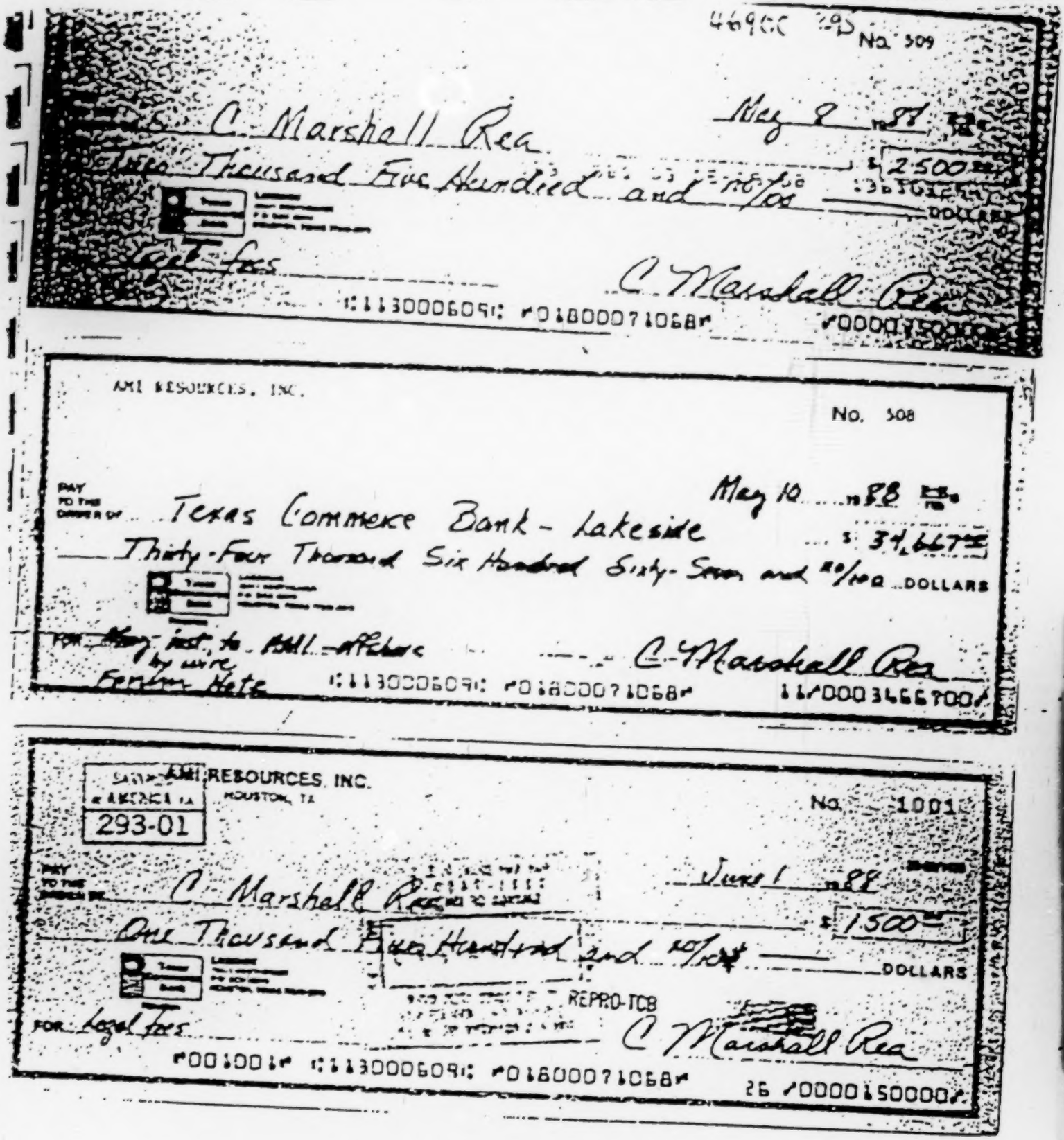
Q. And did you learn what Mr. Rey did with those proceeds from payments on that loan?

A. Yes, sir.

Q. And what did he do with those proceeds?

A. The—basically he would take out a—his legal fees and then wire transfer the money to the Cayman Island, and once in the Caymen Islands he would wire transfer it back to the Channel Islands to the Unicorn Trust.

Q. And had—did he tell you or did you learn from your



469CC 29 No. 509

C. Marshall Rea

May 8 88

Two Thousand Five Hundred and no/100 $ 2500.00 DOLLARS

Legal fees

C Marshall Rea

⑆113000609⑆ ⑈0180007106⑈ ⑈0000150000⑈

AMI RESOURCES, INC.

No. 508

PAY TO THE ORDER OF Texas Commerce Bank - Lakeside

May 10 88

Thirty-Four Thousand Six Hundred Sixty-Seven and no/100 $ 34,667.00 DOLLARS

FOR Money sent to Bell Atlantic by wire for Gordon Kete

C Marshall Rea

⑆113000609⑆ ⑈0180007106⑈ ⑈0003466700⑈

AMI RESOURCES, INC.

HOUSTON, TX

293-01

No. 1001

PAY TO THE ORDER OF C Marshall Rea

June 1 88

One Thousand Five Hundred and no/100 $ 1500.00 DOLLARS

REPRO-TCB

FOR Legal fees

C Marshall Rea

⑈001001⑈ ⑆113000609⑆ ⑈0180007106⑈ 26 ⑈0000150000⑈

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APPENDIX M

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 3731

18 U.S.C. § 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [court] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title [18 USCS §§ 3141 et seq.].

The provisions of this section shall be liberally construed to effectuate its purposes.

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 15

Rule 15. Depositions

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the

deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the

rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to deposition testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by agreement not precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 16

Rule 16. Discovery and Inspection

(a) Disclosure of evidence by the government.

(1) Information subject to disclosure.

(A) Statement of defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally

to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and tangible objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 USC § 3500.

(3) Grand jury transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(A) Documents and tangible objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of examinations and tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on re-

quest of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing duty to disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of discovery.

(1) Protective and modifying orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate.

Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-430

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS NOONS AND PHILIP NOONS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly issued a writ of mandamus to vacate the district court's order that compelled a government witness to submit to a sealed ex parte deposition by defense counsel before trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 878 F.2d 153. The district court's order (Pet. App. 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. Pet. App. 13a. The petition for a writ of certiorari was filed on September 11, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were indicted in the Southern District of Texas on several charges. One count charged petitioners with conspiracy in violation of 18 U.S.C. 371. The objects of the conspiracy were: (1) to defraud the United States; (2) to embezzle and misapply assets of a federally insured savings and loan institution in receivership; and (3) to make false statements to the Federal Savings and Loan Insurance Corporation (FSLIC). Petitioners were also charged with embezzling and misapplying assets of a federally insured savings and loan institution in receivership, in violation of 18 U.S.C. 657, and making a false statement to the FSLIC, in violation of 18 U.S.C. 1001. Pet. App. 2a; Gov't C.A. Pet. 2.[1]

As alleged in the indictment, the FSLIC, as the insurer of deposits, closed the Mainland Savings Association in April 1986. The FSLIC acted as receiver for the Houston bank from May 1986 through August 1988. During that period, petitioner Philip Noons worked as an asset manager for the FSLIC; Noons had worked for Mainland until the bank fell into receivership. Pet. App. 2a; Gov't C.A. Pet. 12-13.

The indictment alleged that Philip Noons and his brother, petitioner Thomas Noons, conspired to defraud the FSLIC, as Mainland's receiver, by causing it to sell at less than fair market value one of Mainland's assets to an entity controlled by C. Marshall

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[1] Petitioner Philip Noons was charged with two additional counts of embezzling and misapplying assets of a federally insured savings and loan institution in receivership, in violation of 18 U.S.C. 657. Gov't C.A. Pet. 2.

Rea, an attorney.[2] Petitioners secretly gave Rea's firm some of the funds that were used to purchase that note; Philip Noons misrepresented the note's value to the FLSIC officials who were responsible for the sale. From the time of the sale, in March 1988, and through February 1989, petitioners used Rea as a conduit by which they received some of the collections on the note. Pet. App. 2a; Gov't C.A. Pet. 14-18.[3]

2. On April 3, 1989, petitioners filed a pretrial motion to dismiss the indictment or to suppress evidence. Petitioners alleged that Rea was their attorney and that the government, with Rea's consent, had recorded conversations between Rea and petitioners. Petitioners therefore claimed that the recordings and the disclosures to the government of these conversations amounted to a breach of the attorney-client privilege and violated the Fifth and Sixth Amendments. Pet. App. 3a, 56a-60a. The government opposed that motion contending that the recorded conversations were not privileged because Rea in fact had not served as petitioners' attorney and because those conversations "were for the purpose of furthering an intended, present, or continuing illegality." *Id.* at 3a; see *id.* at 61a-67a.[4]

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[2] The asset was a $4 million installment note executed in December 1982. The note required the debtor to make monthly payments of approximately $37,000, with an approximate $3.9 million balloon payment due in January 1993. The debtor assigned the note to Mainland in December 1984. Pet. App. 2a; Gov't C.A. Pet. 14.

[3] The additional charges against Philip Noons, see note 1, *supra*, involved the sale of another Mainland asset to an entity controlled by Rea. Gov't C.A. Pet. 19-21.

[4] That motion remains pending before the district court. Pet. App. 5a.

In the meantime, petitioners filed a motion on April 11, 1989, to take Rea's deposition "*ex parte* and under seal for the purpose of questioning him regarding his relationship with ~~the~~ [petitioners], what he told the government about ~~the~~ [petitioners], and 'all matters pertinent to this case.'" Pet. App. 4a; see *id.* at 68a-71a. The government opposed that motion. The government contended that Rule 15 of the Federal Rules of Criminal Procedure does not authorize discovery depositions, that petitioners had not suggested that Rea would be unavailable either for trial or for any pretrial hearings, and that Rule 15 does not permit ex parte depositions under any circumstances. *Id.* at 4a; see *id.* at 73a-75a.

3. After a hearing, see Pet. App. 16a-28a, the district court on May 3, 1989, granted petitioners' discovery motion. The court's order "compelled [Rea] to testify under oath without the government present for the limited purpose of discovery." *Id.* at 15a. That order further provided that "the deposition shall remain sealed until further order of this court." *Ibid.* The court later scheduled the deposition for May 11. *Id.* at 5a.

Rea filed a motion to quash that order. Pet. App. 85a-90a. After another hearing, the district court denied the motion on May 10, 1989. *Id.* at 51a. The government sought a stay of the court's order in the court of appeals and filed a petition for a writ of mandamus to vacate that order. The court of appeals stayed the proceedings pending its consideration of the government's petition. *Id.* at 1a-2a.

4. The court of appeals granted the government's petition and issued a writ of mandamus barring the taking of Rea's sealed ex parte deposition before trial. Pet. App. 1a-12a. The court first concluded that the

Federal Rules of Criminal Procedure do not authorize such depositions. Rule 15(a), by its terms, permits depositions to be taken only so that testimony may be "preserved for use at trial." Fed. R. Crim. P. 15(a). The court pointed out that "there was no claim, evidence, or finding that Rea might be unavailable to testify at trial or at any pretrial hearing." Pet. App. 7a. To the contrary, the district court "expressly ordered that the deposition was 'for the limited purpose of discovery,' " a purpose that the court of appeals held to be impermissible under Rule 15. *Id.* at 6a-7a.[5] Turning to Rule 16, the court similarly held that that Rule "affords no basis for a discovery deposition" since the Rule "does not mention depositions." *Id.* at 6a-7a.

The court of appeals next acknowledged that "in certain limited circumstances the district court in a criminal case may order discovery not provided for by statute or the Federal Rules of Criminal Procedure." Pet. App. 7a. The court, however, distinguished this case from *United States* v. *Carrigan*, 804 F.2d 599 (10th Cir. 1986). In that case, the Tenth Circuit refused to vacate the district court's order for the discovery deposition of two government witnesses where the record supported the trial court's factual finding that the government had interfered with the witnesses' freedom to talk with defense counsel. *Id.* at 604. Here, by contrast, the court of ap-

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[5] The court noted that other circuits had reached the same conclusion. See, *e.g.*, *United States* v. *Troutman*, 814 F.2d 1428, 1453 (10th Cir. 1987); *United States* v. *Cutler*, 806 F.2d 933, 936 (9th Cir. 1986); *United States* v. *Hutchings*, 751 F.2d 230, 236 (8th Cir. 1984), cert. denied, 474 U.S. 829 (1985); *United States* v. *Steele*, 685 F.2d 793, 809 (3d Cir.), cert. denied, 459 U.S. 908 (1982).

peals observed that "there is no allegation, no finding, and no evidence that the government in any way impeded [petitioners'] ability to talk to Rea." Pet. App. 8a. The court further noted that "there is no allegation, evidence, or finding that Rea ever did refuse to talk to [petitioners] or their counsel; rather, there is only the allegation that he refused to do so unless government counsel was also present. There is nothing improper about this." *Ibid.* The court concluded that "[n]o right of a defendant is violated when a potential witness freely chooses not to talk," *ibid.*, and thus petitioners were not entitled to the discovery deposition they sought.

The court of appeals also criticized the district court's deposition order on procedural grounds. The district court had ordered the deposition taken ex parte and then sealed. The court of appeals concluded, however, that "[s]uch a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation." Pet. App. 9a.[6]

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[6] The court of appeals rejected petitioners' contention that the government's alleged prodding of Rea to breach the attorney-client privilege justified the district court's deposition order. The appropriate means of addressing that allegation, the court noted, is through an evidentiary hearing on petitioners' pretrial motion to dismiss the indictment or to suppress evidence. At that hearing, the court of appeals stated, petitioners would have the right to compel Rea's appearance and have him testify. See *United States* v. *Fortna*, 796 F.2d 724 (5th Cir. 1986). The court found that "[t]here is no indication, allegation, or finding that Rea would be unavailable for such a hearing." Pet. App. 10a.

The court of appeals also rejected petitioners' argument that the district court's deposition order was necessary in order to preserve petitioners' claims of attorney-client privi-

Finally, the court of appeals held that the district court's deposition order was properly reviewable on a petition for a writ of mandamus. It recognized the general rule that "discovery and similar pretrial orders, even erroneous ones, are not reviewable on mandamus, particularly in a criminal case." Pet. App. 11a. The writ is available, however, "where, as here, the applicant has no other means of redress, * * * the circumstances are exceptional, and the applicant establishes 'a clear and indisputable abuse of discretion or usurpation of judicial power by the trial court.'" *Ibid.* (quoting *In re First South Savings Ass'n*, 820 F.2d 700, 705-707 (5th Cir. 1987)).

On the record presented, the court of appeals held that review on mandamus was appropriate. The district court's deposition order, the court held, was "wholly unauthorized * * * entirely unprecedented and constitutes a clear and very substantial departure from the fundamental principles governing criminal pretrial and trial procedures in federal court." Pet. App. 12a. The court of appeals further concluded that the district court's order was

> so plainly and substantially in excess of its authority, and so significantly contrary to the established rules and precedents governing depositions in criminal cases, as to constitute a clear and indisputable abuse of its more general discretion to control the incidents of trial and pretrial in cases before it. * * *

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lege that would be waived if petitioners called Rea to testify at a pretrial evidentiary hearing. The court of appeals remarked that "[w]e are aware of no authority that would support such a waiver, and neither the district court nor [petitioners] (here or below) have cited any authority which assertedly supports it." Pet. App. 10a.

Ibid. The court then found that there was "no available remedy other than mandamus" to correct the district court's erroneous order. *Ibid.* The court of appeals therefore held that this case was "that most rare and exceptional case where relief by mandamus is appropriate respecting a criminal case deposition order." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 5-7) that the court of appeals exceeded its authority by reviewing the district court's interlocutory discovery order on a petition for a writ of mandamus. This Court has long held that "[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); see, *e.g.*, *Mallard* v. *United States District Court*, 109 S. Ct. 1814, 1822 (1989); *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Will* v. *United States*, 389 U.S. 90, 95 (1967). Furthermore, "[t]o ensure that mandamus remains an extraordinary remedy," this Court has consistently maintained that applicants "must show that they lack adequate alternative means to obtain the relief they seek, * * * and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable." *Mallard*, 109 S. Ct. at 1822 (brackets in original).

The court of appeals correctly concluded that the government satisfied its burden for obtaining mandamus relief. First, as the court of appeals recog-

nized, Pet. App. 12a, the government had no other means to prevent Rea, a cooperating witness, from being subjected to a sealed ex parte deposition. The deposition order foreclosed the government's participation in an unauthorized discovery process and thus threatened to injure the government's own legal rights as a party—an otherwise unreviewable pretrial matter. Cf. *United States* v. *Carrigan*, 804 F.2d 599, 601 n.1 (10th Cir. 1986). Second, the government established that the district court's order was clearly beyond that court's lawful jurisdiction. As the court of appeals concluded, the district court's approval of petitioners' request for a one-sided deposition was "wholly unauthorized" and constituted "a clear and very substantial departure from the fundamental principles governing criminal pretrial and trial procedures in federal court." Pet. App. 12a. Those are precisely the circumstances that call for the issuance of the extraordinary writ of mandamus.

2. Nevertheless, petitioners dispute the court of appeals' treatment of the district court's deposition order and renew their contention (Pet. 7-11) that Rules 15 and 16 of the Federal Rules of Criminal Procedure authorize that order in this case. Rule 15(a) generally authorizes the taking of depositions in criminal cases "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial * * *." The court of appeals, in accord with other circuits, see note 5, *supra*, recognized that Rule 15(a) "does not authorize depositions for discovery purposes." Pet. App. 6a. But that was precisely the purpose of the district court's deposition order—to "compel[] [Rea] to testify under oath without the government

present for the limited purpose of discovery." *Id.* at 15a.[7]

The record makes clear that petitioners had not sought to take Rea's deposition in order to preserve his testimony for use at either the trial or pretrial hearings. As the court of appeals found, "there was no claim, evidence, or finding that Rea might be unavailable to testify at trial or at any pretrial hearing." *Id.* at 7a. And petitioners now concede that they sought Rea's deposition in order either to support their previously filed motion to dismiss the indictment or to "develop an 'advice of counsel' defense." Pet. 4-5. Those purposes are plainly beyond the scope of Rule 15(a).

Rule 16 of the Federal Rules of Criminal Procedure imposes discovery and inspection obligations on parties in criminal cases. That rule generally calls for production or inspection of photographs, written or recorded statements, recorded grand jury testimony, a defendant's criminal record, documents and other tangible objects material to the preparation of the defense, and reports of physical or mental examinations and scientific tests or experiments. See Fed. R. Crim. P. 16(a)(1) and (b)(1). Rule 16 does not refer to depositions, and it does not even authorize discovery of statements of third-party prospective government witnesses (apart from certain exceptions not pertinent to this case, see Fed. R. Crim. P. 16(a)(2)). Accordingly, Rule 16 "cannot [be] read

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[7] In their original motion to take the sealed ex parte deposition, petitioners candidly stated that "[t]he defense wants to question Rea alone immediately regarding (1) his relationship with [petitioners], (2) what he told the government about them and (3) all matters pertinent to this case." Pet. App. 69a.

* * * as providing a basis for the trial court to order the depositions of adverse witnesses in criminal prosecutions." *United States* v. *Carrigan*, 804 F.2d at 603.

Since the Federal Rules of Criminal Procedure do not authorize the district court's unprecedented deposition order, and "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977), the only available source of authority would be the court's inherent supervisory powers. See *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). As this Court has stated, "[t]he purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights * * *; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury * * *; and finally, as a remedy designed to deter illegal conduct * * *." *Ibid.* The district court's deposition order served none of these purposes.

Petitioners suggest (Pet. 8) that a sealed ex parte deposition would serve the salutary purpose of allowing them to investigate their claim that Rea, at the government's behest, violated the attorney-client privilege, without forcing the defense to reveal trial strategy. That goal, however desirable to the defense, does not warrant the exercise of supervisory powers to sanction an unauthorized discovery procedure. The decision whether to speak with petitioners rests with Rea, not with petitioners. A prospective witness may legitimately refuse to be interviewed for trial preparation by either the defense or the government. Consequently, a district court has no authority to compel an interview against the witness's wishes. See, *e.g.*,

United States v. *Pinto*, 755 F.2d 150, 152 (10th Cir. 1985); *United States* v. *Fischel*, 686 F.2d 1082, 1091 (5th Cir. 1982); *Kines* v. *Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982); *Byrnes* v. *United States*, 327 F.2d 825, 832 (9th Cir.), cert. denied, 377 U.S. 970 (1964). Furthermore, as the court of appeals determined, Pet. App. 8a, when Rea agreed to be interviewed by petitioners' counsel only if the prosecutor were present, he acted without any undue influence by a government representative. In that situation, the district court may not compromise Rea's independent decision in order to aid petitioners' gathering of discovery materials. The court of appeals therefore properly issued the writ of mandamus in order to prevent the district court from exercising power beyond its lawful jurisdiction.[8]

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[8] Petitioners err in contending (Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Carrigan*, 804 F.2d 599 (10th Cir. 1986). In *Carrigan*, the Tenth Circuit refused to vacate the district court's order for the discovery deposition of two government witnesses where the record supported that court's factual finding that the government had interfered with the witnesses' freedom to talk with defense counsel. *Id.* at 604. This case, however, is readily distinguishable since "there is no allegation, no finding, and no evidence that the government in any way impeded [petitioners'] ability to talk to Rea." Pet. App. 8a. The court of appeals further noted that "there is no allegation, evidence, or finding that Rea ever did refuse to talk to [petitioners]; rather, there is only the allegation that he refused to do so unless government counsel was also present. There is nothing improper about this." *Ibid.* The court of appeals thus properly concluded that "[n]o right of a defendant is violated when a potential witness freely chooses not to talk." *Ibid.* Accordingly, petitioners may not rely on *Carrigan* as support for the discovery deposition they sought, particularly where

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1989

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the deposition ordered in that case, in stark contrast to the procedure approved by the district court here, expressly directed that the deposition be taken "in the presence of [the witnesses'] attorney and the government's counsel." 804 F.2d at 601.

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